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In The Supreme Court of the United States October Term, 1991

MARTIN RYAN, BERNARD MCKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH and KATHERINE DOYLE, Class Representatives of the December 31, 1987 participants in the City's Annuitant Healthcare Program, *Petitioners,*

vs.

CITY OF CHICAGO, a Municipal Corporation, and MARSHALL KORSHAK, RUSSELL EWERT, ODELL HICKS, THOMAS D. ALLISON, FRED W. SETTLES, CECIL A. PARTEE, CHESTER JASKOLKA, RONALD R. NORRIS and JAMES MC DONOUGH, in their capacity as the Board members of the Policemen's Annuity & Benefit Fund for cities over 500,000; MICHAEL A. COHEN, NORMAN S. HOLLAND, ANN FOLEY, JAMES R. CONMEY, WALTER S. KOZUBOWSKI, RONALD D. PICUR, RONALD MALONEY, and CECIL A. PARTEE, in their capacity as the Board members of the Firemen's Annuity & Benefit Fund for Cities over 500,000; WILLIAM J. MC MAHON, RONALD D. PICUR, CECIL A. PARTEE, WAYNE N. MARSHALL, and EDWARD J. LAIRD, in their capacity as the Board members of the Municipal Employees' Annuity & Benefit fund for Cities over 500,000; ROGER E. MC MAHON, RONALD D. PICUR, CARMEN IACULLO, and CECIL A. PARTEE, in their capacity as the Board members of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund for Cities over 500,000, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1) Whether, in three-party class litigation in state court, a court's dismissal of the class' claims with prejudice, based upon a settlement agreed to solely by the two parties opposing the class, deprives the class of its due process rights under the Fourteenth Amendment;

or, stated otherwise,

Whether this Court's holding in *Firefighters v. Cleveland*, 478 U.S. 501, 529-30 (1986) (that a settlement between some of the parties to a case cannot dispose of the claims of a nonconsenting third party certified intervenor class), applies to invalidate a state court's dismissal with prejudice of the claims of an intervenor class upon the agreement solely of the parties opposing the class;

2) Whether in three-party state court class litigation, the enactment of state legislation purporting to extinguish the class' claims, pursuant to an agreement solely between the parties opposing the class, constitutes an invalid impairment of contract in violation of the Contract Clause, Art. 1, §10 of the United States Constitution.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

Petitioners, the certified intervenor class of 21,000 participants (as of December 31, 1987) in the City of Chicago's Annuitant Healthcare Plan, request this Court to issue a Writ of Certiorari to review the Illinois Appellate Court's affirmance of the Cook County Circuit Court's dismissal with prejudice of the intervenor participant class' complaint for promised health care benefits, based solely upon the agreement of the parties opposing the class.

OPINIONS BELOW

The trial court's December 15, 1989 order (with accompanying unreported December 12, 1989 opinion), dismissing the participant class' claims with prejudice are attached as Appendices A and B.

The Illinois Appellate Court's opinion affirming the trial court's dismissal appears at 206 Ill.App.3d 968, 565 N.E.2d 68 (1st Dist. 1990), 151 Ill.Dec. 797 (1st Dist. No. 89-3451, filed November 28, 1990), and is attached as Appendix C.

JURISDICTION

This Court's jurisdiction is based upon 28 U.S.C. §1257, to review a final judgment rendered by the highest court of a State (Illinois) in which a decision may be had (i) where the validity of a State statute is drawn into question on the ground of its being repugnant to the Constitution of the United States, or (ii) where any right . . . is claimed under the Constitution . . . of . . . the United States. Specifically, petitioners assert that (1) their due process rights under the Fourteenth Amendment were abridged by the dismissal of their claims with prejudice in the State court below, based solely upon a settlement between the parties opposing the petitioner class, and that (2) their Contract Clause rights were abridged by the application to them of a State statute which was enacted pursuant to the settlement agreement of parties opposing the petitioner class.

On November 28, 1990, the Illinois Appellate Court, First District, Third Division, approved the trial court's dismissal of petitioners' claims. *City of Chicago v. Korshak*, 206 Ill.App.3d 968, 565 N.E.2d 68, 151 Ill.Dec. 797 (1st Dist. No. 89-3451, filed November 28, 1990). Petitioners' timely petition for rehearing was denied on January 15, 1991.

On June 5, 1991, the Illinois Supreme Court denied Petitioners' timely-filed Petition for Leave to Appeal, and, on July 26, 1991, refused Petitioners' request for leave to request reconsideration.

On September 3, 1991, this Court ordered the Petitioners time to petition for a writ of certiorari extended to November 2, 1991.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Contract Clause - Article I, Section 10

"No state shall . . . pass any . . . law impairing the obligation of contracts . . . ."

Fourteenth Amendment - Section Two:

Due Process and Equal Protection Clauses:

"No state shall . . . deprive any person of . . . property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Illinois Constitution of 1970:

Article XIII, §5: Pension and Retirement Rights

> "Membership in any pension or retirement system of . . . any unit of local government. . . shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."

Illinois Statutes:

Illinois Pension Code, Ill.Rev.Stat. ch. 108½, annuitant group health care financing provisions:

A. Paras. 5-167.5, 6-164.2, 8-164.1 and 11-160.1 as amended through August 22, 1989. (The law prior to the enactment of the settlement's legislation.)

B. P.A. 86-273's pertinent provisions Amending Pension Code paras. 5-167.5, 6-164.2, 8-164.1 and 11-160.1 effective August 23, 1989. (The legislation enacted pursuant to the Settlement). As attached at Appendix D.

STATEMENT OF THE CASE

A detailed statement of facts with record citations appears at Appendix E.

Summary of the Litigation.

Petitioners are the certified class of the some 21,000 participants, on December 31, 1987,[1] in the City of Chicago's Annuitant Healthcare Plan, whose intervening complaints to enforce the plan's unchanged continuation were dismissed with prejudice pursuant to a settlement which was agreed to solely by the parties opposing the class, and which sponsored State legislation explicitly changing and terminating the class' contractual rights under the plan.

The City initiated the litigation by filing suit in Cook County Circuit Court against the trustees of the four City annuity and benefit funds that subsidize the program's cost. The participants (petitioners herein) intervened and sought class certification. The litigation thus proceeded with three groups: the City (seeking to reduce or eliminate its costs for health care obligations, recover past charges from the trustees and compel the Funds to take over the health care obligations); the trustees (seeking to continue the City's obligation, prevent increased costs to the Funds and avoid personal cost to the trustees) and the annuitants/participants (seeking to keep their coverage alive for life upon the terms promised by the City and prevent invasion of their pension assets.)

After dismissing the City's claims in full, the Court conducted a hearing upon the intervenors' and Funds' request to enjoin the City from terminating or changing the existing terms and

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[1] The participants whose coverage began after 1987 initiated a separate lawsuit pending in the United States District Court for the Northern District of Illinois (*Retired Chicago Police Ass'n. v. City of Chicago*). Judge Conlon's decision denying a res judicata motion against that class, and substantially criticizing the decision below, is contained in Appendix F.

charges.[2] Substantial evidence was produced that the participant class had been routinely promised, during their City employment, and that lifetime healthcare coverage under a certain 55/21 plan[3] was a benefit of their City employment, that the employees relied, and retired in reliance on that promised benefit. The class participants who retired on or before the end of 1987, clearly also had no other benefits it could rely on.[4] The evidence further showed that the City's attempt to cut off the benefit was initiated as a bargaining ploy in retaliation for the City's being required (in another case) to repay interest wrongfully converted from pension tax levies owned by the participants' pension funds.

After the hearing, but prior to any decision on the merits, the City and trustees entered into a settlement, which provided for the enactment of legislation reducing the City's obligation to only 50% of the Plan costs, slightly raised the pension funds' obligation and terminated both the City's and pension funds' obligations after 1997. The remainder of the Plan's costs would be charged to participants as increased premiums, without creating any additional funding sources for them to pay the increases, and without any assurance of coverage after 1997.

The participants objected, and were finally certified as a class. All of the class representatives and literally hundreds of other participants who responded, unanimously objected to the

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[2] Plan terms were kept in place during the State proceedings by a series of injunctions issued by the trial court and the Illlinois Appellate Court. The City has recently given notice of its intention to implement substantially increased premiums on January 1, 1992, pursuant to the settlement. Petitioners are preparing and will shortly submit to this Court their motion to stay the City from implementing the new charges while this case is pending before this Court.

[3] For police and firemen, the understood program was free coverage for life. The City was to charge premiums of $55 per month for participants, $21 for Medicare-qualified individuals, which the Police and Fire Funds fully paid, while the Municipal and Laborers' Funds paid $25 monthly for their retiree participants. Thus, police and fire participants were to pay only for spouse or dependent coverage costs, while municipal and laborer were assured of paying only the fixed premium in excess of the subsidy.

[4] As governmental employees hired before March 31, 1986, their governmental service does not qualify them for the Medicare program. P.L. 99-272, §13205(d)(2).

settlement as foreclosing their rights in violation of U.S. and Illinois constitutional provisions. The participants asked the court to reject the settlement, and instead enjoin the City from changing the coverage from that lifetime program they had been promised. Failing that, they demanded a fairness hearing, at which they again presented their argument that the settlement was unfair, inter alia because its entry prejudiced their rights without their agreement and without a finding on the merits, thus violating their rights of due process under the United States Constitution.

The trial court, addressing the settlement agreement only from the traditional criteria used in evaluating the fairness of class action settlements, found the settlement to be fair, entered it and dismissed the intervenor participant class' complaints with prejudice.

All of these issues were fully briefed and argued to the Appellate Court. However, the Illinois Appellate Court also looked solely at evaluating the fairness of the settlement's terms, without addressing at all appellants' arguments that the settlement procedure lacked due process and its resulting product was itself substantively invalid and unconstitutional.

The Illinois Supreme Court denied the petitioners' request for leave to appeal, and denied leave to request reconsideration.[5]

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[5] The City gave notice that it would substantially increase the coverage costs to annuitants on March 1, 1990, but was enjoined by the Illinois Appellate Court, from making that change while the appeal was pending. *City of Chicago v. Korshak*, Ill. App.Ct. 1st Dist., 3rd Div. No. 1-89-3451. Injunction entered February 14, 1990. Following the Illinois Supreme Court's refusal to grant leave to appeal, the City has recently given the participants notice of its intention to begin charging new substantially increased premiums to participants on January 1, 1992, under the settlement agreement. We are preparing and will shortly submit a motion for this Court to stay the City from implementing the new rates while the case pends before this Court.

REASONS FOR GRANTING THE WRIT

I.

THE STATE COURT'S DISMISSAL WITH PREJUDICE OF THE INTERVENOR CLASS CLAIM BASED UPON A SETTLEMENT AGREED TO SOLELY BY PARTIES OPPOSING THE CLASS VIOLATED THE CLASS' DUE PROCESS RIGHTS.

The most basic notions of due process include the right of an aggrieved party to have his cause adjudicated on the merits. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433, 71 L.Ed.2d 265, 276, 102 S.Ct. 1148 (1982).[6]

The settlement dismissal below deprived the petitioners of their right to have their cause adjudicated as a decision on the merits.[7] Instead of having their cause decided by the court on its merits, their cause was dismissed with prejudice by the trial court adjunct to its approval of a settlement agreement between the two parties opposing the class in the litigation.[8]

Intervenors' class claims cannot be disposed of by a settlement to which they do not agree:

> "Of course, parties who chose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party without that party's

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[6] The right to have one's case decided by an impartial decision maker is an essential notion of due process. *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

[7] To the extent it is relevant to this petition, the facts of the participants' estoppel claims were quite strong. See our motion for Summary Judgment (R.C1542). At nearly the same time, another similar estoppel claim for lifetime retiree health care coverage was upheld in *Dell v. Village of Streator*, 193 Ill.App.3d 810, 550 N.E.2d 252 (3d Dist. 1990). And identical plan termination language had justified the admission of extrinsic oral representations to estop a private employer from terminating such benefits in *Smith v. ABS Indust.*, 890 F.2d 841 (6th Cir. 1989).

[8] The court explicitly stated that it did not intend to reach the merits of the 1987 class' counterclaims against the City seeking to force the coverage to continue without change. See State Court Opinion of December 12, 1989 at 9-10, 12, and 13.

> agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of non-consenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." (*Firefighters v. Cleveland*, 478 U.S. 501, 528-530, 92 L.Ed.2d 405, 427-428 (1986).)

"An intervenor [has] all the rights of an original party . . . " Ill. Code Civ. Proc. §2-408(f). One of those rights is the right to have his claims adjudicated by the court. Here instead, in three-party litigation (the City versus the Funds' trustees versus the participants) the trial court below dismissed the case on the basis of an agreement between the two parties opposing the class (the City and the Funds) by which they cut off certain rights of the third (the participants' right to enforce the City's promised for lifetime coverage under the promised plan).

The courts below erroneously applied a six point test which is applicable when all of the litigating parties in court reach settlement, and court scrutiny is necessary to assure that absent parties' interests are protected, since the agreement will also bind parties not present before the court.[9] Thus, in the overwhelming number of cases, the court must proceed through its own evaluation of a one-sided presentation in favor of the settlement by all of the previously adverse parties who are now arguing in support of their joint resolution. The test that the courts applied below provides the road map to follow to assure the court that the settlement is indeed fair to all of the parties who were not or have not previously been, present before the court.

But we do not even reach that evaluation point if all of the parties before the court have not agreed to the settlement. The City and Funds simply have no "cram down" right to impose a settlement upon the intervenors participant class, any more

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[9] We find no case which holds that a settlement may be imposed upon the class. The issue in all the guidepost cases is twofold: Has the class itself approved the settlement? —and— Is the settlement is "fair" to the class? *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1156, 1216 (5th Cir. 1978). Where the class has not agreed to the settlement, it is an abuse of discretion for the court, to approve it, even if it thinks the terms might be fair. See also e.g., *City of Detroit v.Grinnell Corp.* 495 F.2d 448, 454, (2d Cir. 1974); and *Gowdey v. Commonwealth Edison*, 37 Ill.App.3d 140, 150 (1st Dist. 1976)

than the annuitants and the Funds it would have had authority to reach an agreement between themselves and force it upon an unwilling City.[10] The court should have rejected such a tag-team settlement here.

The cram-down was especially unfair here since the "settlement" constituted a collusion between the City and pension funds to their own individual benefits adverse to the participants' rights. By the settlement, the City and Funds together prejudiced the Class to its members' detriment and over their objection: (i) wiping out the participant class claim to a promised lifetime retirement benefit package, (ii) transferring up to 50% of future Plan cost increases to the annuitants (iii) ending not only the City's obligation, but also the Pension Funds' authority to pay anything for annuitant healthcare after 1997, and (iv) eliminating the Illinois Constitution's protection of these existing health care pension benefits (by restating them as not protected pension benefits).

Under both Illinois and federal law, the intervenors had an absolute right to have their case decided on the merits, even if the original plaintiff and defendants worked out an agreement between themselves, inter se. "Intervenors have the same rights as the original parties in a case." *Business & Professional People v. ICC*, 136 Ill.2d 192, 555 N.E.2d 693, 144 Ill.Dec. at 341. As in that case, the settlement here cannot be entered into by just two of the three litigating parties, without the agreement of the intervenors. *Id.* 144 Ill.Dec. at 341-42.[11]

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[10] Under the City and Funds' tag team theory of due process, the Funds could have instead entered into an agreement with the annuitant/ Intervenors, which would have bound the City over its objections.

[11] *In re Application of County Collector (St. James Dormitory, Inc.)*, 53 Ill.App.3d 120, 123, (5th Dist. 1977). Also see: *Strader v. Board of Educ. Coles County*, 351 Ill.App. 438, 454, 457-8 (3d Dist. 1953). *Strader* is highly relevant in reversing the lower courts denial of the intervention petition there, after which the original parties entering into an agreed dismissal of the case intending to bind the interests of the intervenors. Here the consent decree dismissal was entered after and in spite of the fact that we had been granted intervention.

Nor is the concept unique to Illinois. Federal law is clear: "Once intervention has been allowed, the original parties may not stipulate away the rights of the intervener."[12]

> Once intervention as of right has been granted, an intervenor should be allowed to litigate fully on the merits, see *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984 (2d Cir. 1947), and shall be considered a party for all purposes.[13]

As the Second Circuit stated:

> "Whatever theory she may have asserted originally on petition for intervention, she is entitled to litigate fully on the merits now that intervention has been granted." (*Park & Tilford v. Schulte*, 160 F.2d 984, 989 (2d Cir. 1947).

Nor is this just a mere creature of statute or rule. This is part of "our deeply rooted tradition that everyone should have his own day in court . . . . [14]

The claims at issue here were direct (class) claims of the participants/intervenors. Since they were not the Funds' claims, the trustees had no authority to compromise them.

The Funds' trustees' right to compromise the Funds' claims ("Claims of the trust,") (pertaining to the amount of the Funds' contribution to health care cost), did not include the power to compromise direct claims of the individuals against the City. The annuitants' claims, as individuals, to participate in the City's health care program upon the terms the city promised them (the individuals), and to compel the Funds to subsidize the costs directly belonged to the individual participant, not the Funds. The trustees never had the power or the authority to compromise

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[12] 3B Moore's Federal Practice 24.16[6] note 7 noting also *Wheeler v. American Home Products (Boyle-Midway Div.)*, 563 F.2d 1233 and 582 F.2d 891 (5th Cir. 1977) reversing district court's dismissal of intervenors claim with prejudice upon settlement of sex discrimination claim between original plaintiffs and defendants.

[13] *In re Oceana International*, 49 F.R.D. 329, 333 (S.D.N.Y. 1970).

[14] 18 Wright, Miller & Cooper, Federal Practice and Procedure (1981 Ed.) §4449 at 417.

these claims.[15]

These trustees are not the participants/beneficiaries' agents and do not have power to bind them or compromise their direct, nonderivative claims.[16]

While trustees generally have the right to settle claims which are for or against the trust estate[17] and do not need beneficiary consent to compromise claims of the estate[18], a trustee simply has no power to compromise a beneficiary's claim against third parties[19], nor to force the beneficiaries/participants to accept the

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[15] Beneficiaries may challenge a trustee's actions where the trustee has a conflict of interest and is acting where his interests may conflict with those of trust beneficiaries. See *Estate of Hawley*, 183 Ill.App.3d 107 at 110 (5th Dist. 1989).

[16] *Scott v. Perona, Perona & Tonozzi*, 115 Ill.App.3d 76, 79-81, 450 N.E.2d 24, 70 Ill. Dec. 811 (3d Dist. 1983). Trustees had no authority to compromise beneficiaries own claims in trust litigation.

[17] Illinois Trust and Trustees Act §4.11, SHA Ill.Rev.Stat. ch. 17, §1665.

[18] See Annotations: *Power and responsibility of executor or administrator to compromise claim due estate*, 72 A.L.R.2d 191, 217 (1960) and *Trustee's power to compromise and settle claims and actions by or against trust estate*, 35 A.L.R.2d 967 (1954).

[19] See e.g., *Scott v. Perona, Perona & Tonozzi*, 115 Ill.App.3d 76 at 80-81 (3rd Dist. 1983) and cases cited therein rejecting beneficiary suit against trustee for failing to negotiate a settlement affecting beneficiary's own interests, specifically holding that a trustee has no authority to compromise interests of the beneficiary as distinct from those of his trust.

trustee's compromise of their claims.[20]

These claims "of beneficiaries" for coverage under the City's plan are the claims that are direct class claims which cannot be settled by the trustees. The parties and attorneys pursuing the entity's derivative claims (here the trustees seeking to limit, cap and end the Funds' subsidy) have conflicting interests with and are inherently incompetent to participants' direct entitlement claims for themselves and their class against the City.[21]

This breach of fiduciary duty — namely, that the trustees in negotiating to minimize their Funds' cost contribution to the

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[20] *Stephens v. Collison*, 274 Ill. 389, 113 N.E. 691 (1916), in reversing a lower court's "cram-down" of a settlement by which all but the appellant had agreed to, stated:

> "The real question in this case of our decision is whether or not a court of equity has the power and the authority to . . . compel a party interested in the trust property to accept a compromise settlement of the trust estate against his will and against his interest, where all the other interested parties are willing and desire the settlement.
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> * * *
>
> [W]e know of no rule of law or equity by which a court could compel him to accept terms of settlement proposed by the other parties to the suit, no matter how much more it might, in fact, be to his and to their interests to so settle than to pursue the litigation to any possible conclusion." 274 Ill. at 394-5, 113 N.E. at 693-4.
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> * * *
>
> "The will in the instant case gave no authority to the trustees or to the court to authorize the compromise in question, and the court had no power or authority to order such a settlement." (274 Ill. at 398, 113 N.E. at 194)

[21] Parties presenting derivative claims (for the entity) have a conflict and are thus not adequate to represent or settle the class claims of the entity's shareholders unless they can show absolutely identical interests. *Ruggiero v. American Bioculture, Inc.*, 56 F.R.D. 93, 94-95 (S.D.N.Y. 1972); *Brickman v. Tyco Toys, Inc.*, 731 F.Supp. 101, 103 (S.D.N.Y. 1990); *Koenig v. Benson*, 117 F.R.D. 330 (E.D.N.Y. 1987); *Kamerman v. Steinberg*, 113 F.R.D. 511 (S.D.N.Y. 1986); *Bertozzi v. King Louie Int'l., Inc.*, 420 F.Supp. 1166, 1178-9 (D.R.I. 1976); and *Barrett v. Southern Conn. Gas Co.*, 172 Conn. 362, 374 A.2d 1051 (Conn. 1977).

City's Annuitant Healthcare Plan[22], — eliminated any bona fide belief that the trustees were authorized to compromise the claims of the annuitants to the promised health care benefits of the City plan, was totally ignored below. Whether done in good faith or bad faith, the trustees' compromising, to the beneficiaries' detrimental prejudice, the beneficiaries' claims against the City to stop it from changing the terms of the health care plan provided them, was a breach of fiduciary duty and a violation of due process.[23]

While the petitioners would not have had the absolute right to veto the actions of the trustees acting for the Fund, they certainly did have the right to veto the trustees compromising estoppel claims that belonged to the participants, rather than the Funds.

Nor were the trustees privy to the participants, authorized to negotiate the participants' direct class claims against both the City (for continued coverage) and the Funds (for continued subsidy).[24] The trustees, since they were negotiating to cut off their own subsidy of the premiums, had a clear conflicting interest with the beneficiaries (claiming continued coverage); so the trustees were not in a position to compromise those claims over the beneficiaries' objections.

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[22] *Bogert, Trusts & Trustees* 2d Ed. 1977 §§721, 593. "The cases in which the beneficiary has been held to be a necessary party are generally instances in which equity thought it desirable that the beneficiary appear in court to look after his own interests." *Bogert* 593 at p.423. The Police and Fire Funds previous promises to pay each annuitant's own single health premium was thus capped and ended the agreement.

[23] In fact, the City acknowledged below the "unremarkable proposition that the claims of intervenors cannot be settled absent their consent." City Opposition to PLA, at 12. We agree! The critical issue is that the participants class' claims of estoppel against the City (to prevent its changing the terms of the health care program which it induced the annuitants (not the trustees) to sign up for) are the participants' claims, not the trustees.

[24] In granting intervention early on, the trial court below recognized that their interests were initially "parallel" but might not always coincide. ". . . while representation by the board members so far appears to parallel the interest of the annuitants, a possibility exists that interest of the two will become divergent. Therefore, this court will grant the petitions to intervene." (May 5, 1988 Transcript at 20 attached at Appendix G.)

II. THE SETTLEMENT BY AGREEMENT TO SPONSOR LEGISLATION TO CUT OFF THE PARTICIPANTS' RIGHTS EXCEPT AS DEFINED BY THE SETTLEMENT CONSTITUTED AN ILLEGAL IMPAIRMENT OF THE PARTICIPANTS' CONTRACT RIGHTS

The settlement agreement's covenant to have State legislation enacted to change the rights of the participants who retired or vested prior to its enactment (and thus had contractual rights in effect prior to the statute's enactment), constitutes substantial impairment of the participants' contract rights without a legitimate reasonable justification.

To the extent that the settlement purported to allocate rights between the City and the trustees, and to change the benefits for people who retired or vested after the statute's enactment, there would be no complaint. However, for this 1987 class, the agreement, and its underlying statute, sought to foreclose their existing vested rights and their right to have their claims to those rights decided on the merits. This is one of those few instances where the contract clause prohibition is, in fact, triggered.

An agreement by which some of the litigating parties agree to have legislation enacted by the State which will change the rights and replace the contract claims of the nonconsenting opposing party is the enactment of a law impairing the obligation of contracts.

> "The obligations of a contract . . . are impaired by a law which renders them invalid, or releases or extinguishes them . . . ."

Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 at 431[25] The Contract Clause is triggered by State legislation involving the government's own contractual obligations or others affecting

---

[25] Upholding State's temporary extension of redemption rights during a time of economic crisis.

private contracts.[26] The case at bar is almost a mirror image of *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978), which invalidated a taxing statute which effectively forced full vesting of certain retirement plans by employers with Minnesota operations, regardless that the petitioner employer's plan was, by its terms, nonvested and terminable at will.[27]

"The first inquiry [is] whether the State law has, in fact, operated as a substantial impairment of a contractual relationship." *Spannaus*, 438 U.S. at 244. Once an impairment is determined, the burden shifts to the defendants to show that the impairment is a reasonably necessary and limited response to meet a legitimate societal need:

> "The severity of the impairment measures the height of the hurdle the State legislation must clear. Minimum alteration of contractual obligations may end the inquiry after its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the State legislation."

Spannaus, 438 U.S. at 245.

Spannaus explicitly found that the forced vesting and funding upon the employer was a substantial modification of the compensation the company had agreed to in an area of major company interest — the funding of benefits. The obverse of that occurs here — the termination or change of 21,000 retiree participants' health care benefits, and the termination of their ability to present their claims to the court — must equally be considered a severe impairment of their rights.

---

[26] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 16 (1977), invalidating the repeal of a convenant statutorily enacted to encourage persons to purchase New York/New Jersey port authority bonds by limiting the authority's ability to subsidize rail passenger transportation.

[27] The statute imposed a tax effectively requiring prescribed employers who had a qualified pension plan to provide funds sufficient to cover full pensions for all employees who had worked at least ten years if the employer either terminated the plan or closed its offices in the state, a law that greatly altered the companies' liabilities under its contractual pension plan.

Having shown a substantial impairment under the *U.S. Trust - Spannaus* rule, the burden then shifts to the defendants to show that the impairment is both necessary and reasonable to serve a broad societal interest (rather than a narrow class), that the relief has been tailored to the temporal need, that the conditions imposed were reasonable, and that the period of impairment is limited by the period of the necessity. Necessity is shown only when the state's objectives could not have been achieved through less dramatic modifications of the contract.

Here, there was simply no bona fide State interest in abridging their claims or preventing the participants from having their claims against the City fully adjudicated on the merits. This is substantially different than *Blaisdell's* temporary extension of redemption periods or other State action taken in times of economic crisis. Here, the only supporting basis for the statute is that the City and Pension Funds' trustees wanted to cap their obligations to the participants. But the mere fact that the City of Chicago agreed with the Pension Funds' trustees to settle their mutual claims against each other and end both their obligations to the participants is not sufficient Contract Clause justification for enacting a statute cutting off the participants' existing rights or their ability to have those rights adjudicated.

Thus, the enactment of this statute, pursuant to a settlement between the City and the Funds, as it purports to cut off the 1987 retiree class to benefits they had vested in by their retirements prior to the end of 1987, was a substantial impairment of their contract obligations without justification under the Contract Clause.[28]

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[28] Although the statute possibly could stand prospectively to those whose rights are determined after its August 23, 1989 date of enactment.

CONCLUSION

For the foregoing reasons, the dismissal of the class' claims based on the settlement entered into only by parties opposing the class, constitutes a violation of the participants class' due process rights, and the agreement to sponsor legislation purporting to cut off the participant class' existing rights unconstitutionally impaired their rights of contract.

For the reasons set forth in this petition, we pray that this Court issue a Writ of Certiorari and reverse the trial court's dismissal, with prejudice of the intervenor class participant claims based soley upon the agreement of the parties opposing the intervenor participant class.

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(2) counterclaims of trustees of Fund are dismissed with prejudice;

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(4) class action counter-claim for injunctions, restraintive and mandatory, and other relief is dismissed with prejudice; and

(5) court retains jurisdiction solely for enforcing terms of settlement and adjudicating the intervenor petitioners attorneys' fees 1-3

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Final Judgement Order of December 15, 1989

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE CITY OF CHICAGO, a municipal corporation, Plaintiffs-Counterdefendant, vs. MARSHALL KORSHAK, et al., Defendant-Counterplaintiffs.	)	No. 87 CH 10134
MARTIN RYAN, WALTER RUCINSKI, BERNARD McKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH, AND KATHERINE DOYLE, Intervenors.	)	

FINAL JUDGMENT ORDER

This cause coming to be heard for entry of a final judgment following the settlement of this class action and this Court's approval thereof,

IT IS HEREBY ORDERED:

1. The proposed settlement is finally approved as being fair and reasonable and in the best interest of the class members;

2. The Counterclaims filed by the trustees of the Policemen's Annuity and Benefit Fund of Chicago, Firemen's Annuity and Benefit Fund of Chicago, Municipal Employees', Officers' and Officials' Annuity and Benefit Fund of Chicago, and Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago are hereby dismissed with prejudice;

3. Intervenors' Class Action Response and Request For Injunctive Relief, filed by Martin Ryan, Bernard McKay, Walter Rucinski, Joseph Coglianese, Louis Eisen and George J. Gannon is dismissed with prejudice;

4. The Class Action Counter-Claim For Injunctions, Restraintive and Mandatory, and Other Relief, filed by Bernard Hogan, Patricia Darcy, Sylvia Walsh and Katherine Doyle is dismissed with prejudice.

5. This Court retains jurisdiction solely for the purpose of enforcing the terms

of the settlement and adjudicating the intervenor petitioners attorneys' fees.

ENTERED:

December 15, 1989

DATE

/S/Albert Green

Hon. Albert Green
Circuit Court 0129

Attorney No. 23414

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE CITY OF CHICAGO, a municipal corporation,	)	
Plaintiffs -Counterdefendant,	)	
vs.	)	No. 87 CH 10134
MARSHALL KORSHAK, et al.,	)	
Defendant -Counterplaintiffs.	)	
MARTIN RYAN, WALTER RUCINSKI, BERNARD McKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH, AND KATHERINE DOYLE,	)	
Intervenors.	)	

AGREED ORDER

This cause coming to be heard for entry of an Agreed Order implementing the terms of a certain settlement entered into by the City of Chicago ("the City") and the co-trustees of

the Municipal Employees', Officers' and Officials' Annuity and Benefit Fund of Chicago, Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago, Firemen's Annuity and Benefit Fund of Chicago, and the Policemen's Annuity and Benefit Fund of Chicago ("the Funds") and all parties having been given due notice and the Court being fully advised in the premises, now, and therefore,

THE COURT HEREBY FINDS:

6. On August 23, 1989, the Governor signed into law Senate Bill 95 as Public Act 86-273, codified in part at Sections 5-167.5, 6-164.2, 8-164.1 and 11-160.1. Those portions of Public Act 86-273 are hereby expressly incorporated by reference. This Agree Order is intended to supplement those provisions of Public Act 86-273 and, unless otherwise indicated, pertains only to the period ending December 31, 1997.

Pursuant to the agreement of the City and the Funds,

IT IS HEREBY ORDERED:

A. The City and the Funds shall each pay their own internal costs of administering the annuitants' medical benefits plan. The City shall pay 50% of the claims billed by Blue Cross, Banker's Life and Home Pharmacy and all of the administrative costs charged by Banker's Life and Home Pharmacy.

B. The City shall advise the Funds of all proposed premium increases for health care at least 90 days prior to the effective date of such change. Any such increase shall be prospective only.

C. Any premiums to be charged the annuitants shall be uniform among the four Funds. Following the initial setting of premiums pursuant to this agreement, any increases shall not discriminate between retired employees and widows in setting

premiums, or on the basis of age or claim experience.

D. If the City offers more than one plan, an annuitant may elect to convert coverage from one City plan to another, during times designated by the City which shall occur at least annually. There shall be no limit on the number of times an annuitant may convert coverage. If an annuitant leaves or fails to enroll in a City plan, he or she may later enroll in a City plan under the same terms and conditions which existed prior to implementation of this agreement.

E. The City agrees that its health care plan administrators, Blue Cross, Bankers, and Home Pharmacy, will be directed to continue their ordinary practices regarding the processing of claims. For example, the City will not permit or direct annuitants' claims to be backlogged so as to result in a disproportionate amount of claims being processed during 1990.

F. The City agrees that any actuary hired by the Funds will be provided the same date as the independent actuary and will have the right to consult with the independent actuary concerning the premiums to be charged annuitants.

G. The City agrees that it will be responsible for notifying the annuitants of any increased health benefits premiums.

H. The City shall not pursue its right of appeal from this Court's Order of May 16, 1988, dismissing its Complaint with prejudice, without prejudice to its rights to seek whatever relief may seem appropriate a the conclusion of the ten year period covered by the parties' agreement as embodied herein.

I. The Funds shall dismiss their pending counterclaims without prejudice to their rights to seek whatever relief may seem appropriate at the conclusion of the ten year period covered by the parties' agreement as embodied herein.

J. The parties agree to negotiate in good faith toward achieving a permanent resolution of this dispute on or before December 31, 1997. Failing agreement, the parties shall be restored to the same legal status which existed as of October 19, 1987, with the exception that the City agrees not to pursue any claim for past amounts allegedly due it for the costs of annuitants' health benefits incurred prior to March of 1990. The Funds, intervenors or any annuitant may contend that the City is obligated to provide and pay for the health care benefits of its retired employees and their dependents to the extent that such cost exceeds the premiums which went into effect in April of 1982. Similarly, the City may contend, as it did in the trial of this case, that it has no obligation to provide or pay for health care benefits for its retired employees or their dependents.

K. Within 60 days the City shall pay to the actuary firm of Donald F. Campbell the sum

of $7,698.65 for services rendered by the firm, at the City's request, in conjunction with the agreement embodied herein.

L. The Court otherwise reserves jurisdiction of this cause solely to enforce the terms of this Agreed Order.

ENTERED:

_____

DATE

/S/

AGREED TO:

/S/Jospeh A. Moore

/S/Katrina Veerhusen

/S/Martin J. Burns

/S/William Marovitz (by K.V.)

/S/Frederick Heiss (by K.V.)

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Cook County, Illinois Circuit Court Opinion and Memorandum of Law of December 12, 1989 11-47

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CITY OF CHICAGO, a municipal corporation,	)	
Plaintiff-Counterdefendant,	)	No. 87 CH 10134
vs.	)	
MARSHALL KORSHAK, et al.	)	
Defendant-Counterplaintiff.	)	
MARTIN RYAN, WALTER RUCHINSKI, BERNARD McKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH and KATHERINE DOYLE,	)	
Intervenors.	)	

OPINION AND MEMORANDUM OF LAW

On November 27, 1989, this Court presided over an evidentiary hearing to consider the proposed settlement between the City of Chicago, the four Pension Funds, and the annuitants of the Funds who participate in the City of Chicago Annuitant Health Benefits Plan.

A brief history of this litigation is warranted in light of the fact that there has been a full two years since this litigation commenced, and 1 1/2 years since this Court presided over a trial of the Funds' Counterclaims.

In October of 1987, the City of Chicago ("City") advised the four Pension Funds that it would no longer include the City's retired employees in the City's health care plan or pay for the medical services rendered to those persons. The City then filed a complaint in this Court, naming as defendants the trustees of the four Funds, in which it sought to end the annuitants' health care coverage and recover approximately $58,000,000.00 it had spent on annuitants' health care benefits since 1980. In response to the complaint, the Funds argued that they were not responsible for the past or future costs of annuitant health care, beyond the subsidies provided for in the Illinois Pension Code, because they had no authority to do so and were legally

required to limit use of the assets to meet pension obligations.

The Funds each filed Counterclaims on behalf of the annuitants to attempt to prevent the City from terminating the annuitants' coverage under the City's health care plan and to force the City to continue paying for most of the cost of the coverage. The City agreed to continue annuitants health care benefits while the litigation was pending.

This Court eventually dismissed the City's complaint with prejudice, finding that the Funds had no obligation to reimburse the City for the health care benefits received by the annuitants since 1980. The claims asserted in the Funds' Counterclaims, were the subject of a bench trial before this Court in June of 1988. However, before the Court could reach its decision at the conclusion of the trial, the City and the Funds agreed to sponsor legislation amending the various pension codes and to enter into a settlement

of the Court action consistent with the legislation.

TERMS OF THE SETTLEMENT

The settlement provides in general terms, that the City will pay at least 50% of the participating annuitants' health care costs through the end of 1997, the Funds will increase the subsidies, and the annuitants will pay any balance due after the funds subsidies are deducted. (Nothing in the agreement or the statute precludes the City from paying ore, as it has in the past.) Because the increase in Fund's subsidies could not be effective until the Pension Code was amended to permit them to do so, the proposed settlement was essentially put on hold until the Legislature, in June of 1989, passed amendatory legislation to implement this term of the settlement. The legislation (Public Act 86-273) was signed by the Governor August 23, 1989.

The basic terms of the settlement are contained in the new legislation. They are as

follows: commending with the date the increased annuitant payments take effect, the City is required by state law to pay at least 50% of the cost of the health care claims of the annuitants who participate in the City's health care plan. For the period January 1, 1988 until December 31, 1992, the four Funds will pay the City, on behalf of the annuitants who participate in the City plan, up to $65.00 per month for each non-Medicare annuitant and up to $35.00 per month for each Medicare-annuitant. From January 1, 1993 until December 31 1997, the Funds' subsidies will increase by $10.00 per annuitant per month. For the first time, the widows of annuitants will receive the same subsidies as the annuitants themselves.

The legislation further provides that the City's obligations to continue coverage and to pay at least 50% of the cost of coverage will terminate at the end of 1997, but that this provision "does not affect other obligations that may be imposed by law;" that the group

coverage plans described in the statute "are not and shall not be construed to be pension or retirement benefits for the purposes of" the Illinois Constitution of 1970; that the cost of claims of the annuitants will be estimated by the City on the basis of a written determination by an independent actuary to be appointed and paid by the City and the four Funds; and that the annuitant may elect to terminate coverage in a plan at any time.

In addition to the terms contained in the legislation, counsel for the Funds and the Corporation Counsel for the City committed to a letter agreement which contained other terms and conditions with the proposed settlement. In pertinent part, those additional terms and conditions are as follows:

> The City is obligated to give notice of proposed increases in rates at least 90 days prior to the effective date of such changes.
>
> The Funds have the right to retain a separate actuary to monitor the work of the independent actuary and to consult with the independent actuary

concerning the payments to be charged annuitants.

The City has agreed to pay all of the administrative costs proposed by Banker's Life and Home Pharmacy and 50% of the claims billed by Blue Cross (at a discounted rate) to the City.

If the city offers more than one health benefits plan, an annuitant may elect to convert coverage from one City plan to another, during times designated by the City, which shall occur at least annually. There will be no limit on the number of times an annuitant may convert coverage. If an annuitant leaves or fails to enroll in the City plan, he or she may later enroll in a City plan under the same terms and conditions which existed prior to implementation of this agreement.

The Court had the benefit of hearing the testimony of witnesses opposing the proposed settlement hereinabove set out and was further aided by the post-trial memorandum filed by the City and the Funds, the Funds' memorandum was a joint memorandum; a memorandum filed by the Participant Class opposing the proposed settlement. The Participant Class also renewed their motion for summary judgment, and their motion for permanent injunction against

the City's changing the terms of health care benefits provided to existing annuitant participants in the City's annuitant health care plan.

Further the Court reviewed all of its original notes and the testimony taken during the bench trial conducted by this Court in June of 1988.

The Participant Class in opposing the proposed settlement states that the settlement is unfair because:

> A: The participants are entitled to the status quo coverage under principles of contract, detrimental reliance, promissory estoppel and the Illinois Constitution.
>
> B: The participants are being denied, their coverage in retaliation for the Courts stopping the City's illegal use of Pension Fund tax levies.
>
> C: The settlement subjects the class to extreme hardship while it relieves the City of costs which are a minimal portion its annual budget (less than 1 or 1/2%).

They contend that the proponents of the settlement fail to meet their burden of proof

to show that the settlement is fair; that the facts show that the settlement is unfair and should be rejected; that the annuitants relied upon the City's promise and the City should be estopped from changing the terms of coverage; that the annuitants and their families will be unable to obtain coverage elsewhere; that the City's whole basis for this litigation is bad faith; and that the annuitants presented a strong likelihood of success on the merits.

The Court has taken into consideration all of the testimony of the opponents and has reviewed very carefully the brief in opposition to the proposed settlement.

The court finds the brief filed by the Pension Funds to be extremely persuasive and most exact in its factual presentation.

The procedural and substantive standards governing class action settlement hearings are well established. This Court must evaluate the fairness of the settlement in light of the benefits provided thereunder and the risks of further litigation. In addition, the Court

should satisfy itself that the settlement was reached after arm's length negotiations between counsel authorized to act on behalf of the respective parties and that the Class was adequately notified of the proposed settlement and the opportunity to object. People ex rel. Wilcox v. Equity Funding Life Ins. Co., 61 Ill.2d 303, 335 N.E.2d 448 (1975); Gowdey v. Commonwealth Edison Co., 37 Ill.App.3d 140, 345 N.E.2d 785 (1st Dist. 1976). See also, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983).

Only a small percentage of class members have indicated their objection to the agreement. By their silence, the vast majority of the class members have indicated their approval of the terms of the settlement. The settlement clearly satisfies all prerequisites for judicial approval, and is in the best interests of class members. The settlement should be approved by this Court.

GENERAL CONSIDERATIONS AND BACKGROUND

As a general rule, the law favors and encourages the settlement of class action suits. Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983); West Virginia v. Chas. Pfizer & co., 440 F.2d 1079, 1085 (2d Cir.), cert. denied, 404 U.S. 871 (1971). Before approving a class action settlement, the Court must find the proposal to be "fair, adequate and reasonable." People ex rel. Wilcox v. Equity Funding Life Ins. Co., 61 Ill.2d 303, 335 N.E.2d 448, 456 (1975); Weinberger, supra, 698 F.2d at 73. The assessment of those factors rests within the discretion of the trial court. Gowdey v. Commonwealth Edison Co., 37 Ill.App.3d 140, 345 N.E.2d 785, 793 (1st Dist. 1976). This is because the trial judge has been exposed to the "strategies, positions and proofs" of the litigation and is well "aware of the expense and possible legal bars to success." Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 34 (3d Cir. 1971). A trial

court "should not disapprove a settlement nor should its approval be overturned on review unless, taken as a whole, the settlement appears on its face so unfair as to preclude judicial approval." Gowdey, supra, 345 N.E.2d at 793.

The determination of whether a settlement is fair, reasonable and adequate requires the examination of an amalgam of factors, the principle factor is a balancing or comparison of "the terms of the compromise with the likely rewards of litigation." Wilcox, supra, 335 N.E.2d at 456, quoting Protective Committee for Independent Stockholders of TMT Trailer Ferry Inc. v. Anderson, 380 U.S. 414, 424-25 (1968).

Criteria for evaluating the fairness of a proposed class action settlement were set forth by the Second Circuit in City of Detroit v. Grinnel Corp., 495 F.2d 448 (2d Cir. 1974). Although these criteria are obviously not binding on this Court, they provide a

convenient framework within which to examine the relevant factors. They are:

> (1) the complexity, expense and likely duration of the litigation;
>
> (2) the reaction of the class to the settlement;
>
> (3) the stage of the proceedings and the amount of discovery completed;
>
> (4) the risks of establishing liability;
>
> (5) the risks of establishing damages;
>
> (6) the risks of maintaining the class action through the trial;
>
> (7) the ability of the defendants to withstand a greater judgment;
>
> (8) the range of reasonableness of the settlement fund in light of the possible recovery; and
>
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the atendant risks of litigation.

Grinnell, 495 F.2d at 463 (citations omitted).

In assessing the fairness of a settlement under the Grinnell criteria, a court's function is not "to reopen and enter into

negotiations with the litigants in the hope of improving the terms of the settlement." Levin v. Mississippi River Corp., 59 F.R.D. 353, 361 (S.D.N.Y.), aff'd., 486 F.2d 1398 (2d Cir. 1973), cert. denied, 414 U.S. 1112 (1974). Rather, the court should examine the settlement terms, the process by which the settlement was reached and the judgment of counsel to determine whether the settlement falls within the broad range which may be categorized as "reasonable". Weinberger, supra; Grinnell, supra; Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 309 (S.D.N.Y. 1971). Each of these factors will be examined in the context of the instant settlement.

1. Complexity, Expense and Duration of Litigation

There can be little argument with the fact that this case presents the kind of dispute where a fair and reasonable settlement would be beneficial to all parties concerned and to the public interest, and as a consequence to the policy of the law to

encourage settlements should be extended to it.

Approval of the agreement will obligate the City to pay at least 50% of the total cost of the annuitants' health benefits until December 31, 1997. As noted above, nothing precludes the City from paying more, as it has in the past. If the agreement is not approved, the litigation will return to the posture it was in in June of 1988, when the parties reached a settlement in principle. Post-trial briefs will be submitted and this Court will issue its judgment on the merits of the Funds' Counterclaims. Appeals are sure to follow, both from dismissal of the City's Complaint and from this Court's judgment as to the Counterclaims. During the lengthy appeal process, the annuitants' health benefits will continue to be in limbo -- both as to coverage and who pays the cost of coverage. The agreement is clearly in the best interest of both the class members and the public.

2. Reaction of the Class to the Settlement

In cases of this nature, which are highly visible and where there are numerous members of the class, objections are to be expected. Even significant opposition to the settlements from class members "cannot serve as an automatic bar to a settlement that a (trial) judge, after weighing all the strengths and weaknesses of a case and the risks of litigation, determines to be manifestly reasonably." TBK Partners, L.T.D. v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1982). The court must independently assess the adequacy of the settlement, even in the absence of any objections. In re Traffic Executive Association - Eastern Railroads, 627 F.2d 631, 634 (2d Cir. 1980).

When objections are presented, however, they must be weighed according to their substantive merit.

The Notice of Class Certification, which was sent to approximately 16,000 persons in

early November, 1989, informed the class members that any notice of intent to appear at the fairness hearing had to be filed in writing with the Court by November 21, 1989, and that copies of such notices should be mailed to one of the attorneys for the parties. Counsel for the Funds were made aware of only one notice of intent to appear at the November 27th hearing. Counsel have received a number of letters indicating annuitants' approval of the terms of the settlement and a number of letters indicating opposition to it. counsel for the opponents presented in excess of 500 preprinted form letters opposing the proposed settlement. The Court has considered these objections in making its decision. Although a number of class members apparently oppose the settlement because it will result in some paying increased premiums for coverage, in the past these rates have reflected the political processes and nothing in the agreement

prevents the City from paying much more than 50%.

In addition to the notice of class certification, which was mailed to all class members in early November, the annuitants have also received a letter from the City advising them of the cost to them of continued coverage in the City health benefits plan, assuming this proposed settlement is approved. Not surprisingly, many annuitants have indicated these new rates are too high or that they cannot afford them.

since 1982, when the last rate increase occurred, most retired employees of the City have been paying nothing for their health benefits. The $55 (for non-Medicare) or $21 (for Medicare-eligible annuitants) contributed by the Police and Fire Funds, was equal to the amount of "premium" charged by the City. By contrast, under the 1990 rates just announced by the City, a singly annuitant not covered by Medicare will be paying $105 per month. Although this is a substantial increase, the

important fact is that the actual cost of annuitant's coverage is $340. If the City were successful in this litigation, these annuitants could required to pay $285 per month (after deducting the Funds' $55 contribution) or $3,420 per year out of their own pockets. Annuitants in other rate classifications could required to pay even more to maintain coverage.

The raison d'etre of a settlement is to eliminate the risk of not prevailing on the merits. The Fund submit that under the circumstances prevented here, the proposed settlement, which obligates the City to continue coverage and to pay at least 50% of the annuitants' health care costs until the end of 1997, is in the best interests of all parties.

The substantial benefits conferred upon the annuitants under the proposed settlement must be viewed in light of the risk that the annuitants would not prevail on the merits of the litigation. The Funds submit that this

"balancing test" compels the conclusion that the proposed settlement is in the best interests of all parties and should be approved by this Court.

3. The Stage of Proceeding and Discovery

The purpose of considering the "state of proceeding and the discovery taken" is to ensure that the class members have had access to sufficient material to evaluate their case and to assess the adequacy of the settlement proposal in light of an informed judgment of the strengths and weaknesses of their position.

The proposed settlement here was reached after discovery was completed and after a full trial on the merits of the Funds' Counterclaims.

This case has thus advanced to the eve of a judgment on the merits, in contrast to most other cases where settlements have been approved. Here, this Court has had the

benefit of the annuitant-class members and is thus uniquely qualified to evaluate the reasonableness of the settlement.

4-5. The Risks of Establishing Liability and Damages

In assessing the fairness, reasonableness and adequacy of the settlement, the Court must balance the amount of the proposed settlement and the immediacy of a prospective recovery for class members against the continuing risks of litigation. The risks in this case involve primarily the establishment of the City's liability for the cost of its retired employees' health benefits. This proposed settlement eliminates the risk that the Funds and their annuitants will not be successful in establishing that liability. A secondary benefit of the settlement is elimination of the delay and expense which will be incurred if the proposed agreement is not approved. For the past two full years, the annuitants have been aware of the City's position that it was legally entitled to terminate both the

annuitants' participation in the City's health benefits plan and its payment of any of the bills for those benefits. Bringing an end to this uncertainty is another benefit of the proposed agreement.

6. The Risks of Maintaining the Class Action Through the Trial

Because this is not the typical class action, this factor is generally irrelevant.

7. The Ability of the Defendant to Withstand a Greater Judgment

This factor requires the Court to consider whether the City would be financially able to satisfy a judgment in excess of the settlement amount. This factor is not particularly relevant in the instant cause because there is no "settlement amount" as such. Nonetheless, it is relevant to point out that this settlement will cost the City an estimated $261 million (actual cost of $25.3 million in 1988, $35.7 million in 1989, and another eight years at an estimated minimum of $25 million per year).

8-9. The Range of Reasonableness of the Settlement in Light of the Possible Recovery and All the Attendant Risks of Litigation

The determination of a "reasonable" settlement is not susceptible of a mathematical equation yielding a particularized sum. Rather, as Judge Friendly has explained, "(i)n any case, there is a range of reasonableness with respect to a settlement." Newman v. Stein, 464 F.2d 698, 693 (2d Cir.), cert. denied, 409 U.S. 1039 (1972). See denied, Zerkle v. Clevand-Cliffs Iron, Inc., 52 F.R.D. 15, 159 (S.D.N.Y. 1871); Glicken v. Bradford, 35 F.R.D. 144, 152 (S.D.N.Y. 1964).

The Second Circuit has held that a settlement can be approved even though the benefits amount to a small percentage of the recovery sought. City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974): "The fact that a proposed settlement may only amount to a fraction of the potential recovery

does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." In a footnote, the Court buttressed its conclusion: "In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundreth or even a thousandth part of a single percent of the potential recovery." Id. at 455 n.2.

Here, by contrast to the usual class action settlement, the Funds and annuitants have not sued for money damages and are not settling for some percentage of their actual damages. Instead, the proposed agreement eliminates the risk that the annuitants would have to pay the entire bill for their health benefits and the further and more serious risk that they may not be able to obtain coverage at any price. The agreement eliminates these risks by committing the City to pay at least 50% of the cost of the annuitants' health benefits through the end of 1997. At the conclusion of that period, if no "permanent

solution" has been found, the parties will return to the legal postures they were in in June of 1988, before this compromise was negotiated.

On balance, no one can reasonably state that the proposed settlement is anything but fair, adequate and reasonable. It is in the best interests of the class that the settlement receive this Court's final approval.

The Court finds that the settlement was achieved only after arduous arm's length negotiations.

To avoid the burden of unduly extended inquiry into the claims asserted and benefits resulting from the settlement, the federal courts often have focused on the "negotiating process by which the settlement was reached . . . ." Weinberger v. Kendrick, 698 F.2d 61, 74 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983). The courts have thus insisted that a settlement be the result of "arm's length negotiations" effected by counsel possessed of

the "experience and ability . . . necessary to effective representation of the class' interest." Weinberger, supra, 698 F.2d at 74 (citation omitted).

In evaluating the negotiations, the trial court is permitted to rely on the judgment of counsel. Weinberger, supra, 698 F.2d at 74; West Virginia v. Chas. Pfizer & Co., 314 F.Supp. 710, 741 (S.D.N.Y. 1970), aff'd., 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971). In fact, the opinion of counsel is entitled to considerable weight by the court. Cannon v. Texas Gulf Sulphur Co., 55 F.R.D. 308 (S.D.N.Y. 1971); Josephson v. Campbell, (1967-69 Tr. Binder) Fed. Sec. L. Rep (CCH), 92, 347 at p. 96, 658 (S.D.N.Y. 1969). In Lyons v. Marrud, (1972 Transfer Binder) Fed. Sec. L. Rep. (CCH) 93, 525 (S.D.N.Y. 1972), the court noted that:

> Experienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well advised and necessary. The parties' decision regarding the respective merits of

> their positions has an important bearing on this case.

Id. at p. 92, 520. Indeed, in the absence of fraud, collusion or the like, the Court should be hesitant to substitute its own judgment for that of counsel. Weinberger, supra, 698 F.2d AT 74.

This court has had the opportunity to acquaint itself fully with the facts and law of this case and has been apprised of the procedural aspects of this litigation to date. Similarly, the Court is aware that this has been a hard-fought case and that competent and experienced counsel represent both the City and the Funds, the parties who negotiated the settlement.

This is an unusual case in a number of respects, including the fact that the Funds, who were permitted by this Court to act on behalf of the annuitants throughout the discovery and trial phases of this litigation, negotiated and support the proposed settlement. By contrast, counsel for the

class, which was certified on the even of th settlement hearing, opposes the settlement c various grounds. Consequently, this Cour must consider the City's and Funds' reason for supporting the settlement and clas counsel's reasons for opposing it.

There can be no hint of collusion i conjunction with either the vigorousl contested litigation or the hard bargainin that preceded the agreement. Many of th details in the negotiations surrounding th settlement were hotly disputed. Thus, th settlement was produced by "arm's length bargaining after energetically conteste litigation and in the context of numerou contested issues of fact and law, many o which have not yet been decided.

The Court finds that the notice given th annuitants meets the requirements of du process and Section 2-806 of the Illinois Cod of Civil Procedure.

Each of the approximately 16,00 annuitants and widows of annuitants wh

participate in the City health benefits plan was given notice of the proposed settlement and fairness hearing, by first class mail, in accordance with this Court's Order of October 30, 1989. This notice clearly meets the due process requirements of Section 2-806 of the Illinois code of Civil Procedure, which calls for such "notice as the Court may direct."

The notice informed the class members of their right to appear at the fairness hearing and to enter appearances through their own counsel, if desired.

The notice fully and explicitly explained the litigation, the proposed settlement and the rights and options of the class members. The notice complies with the requirements of due process and is similar to the procedures approved in other cases. See, e.g., Weinberger, supra, 698 F. 2d at 71-72; Grunin v. International House of Pancakes, 513 F.2d 114, 121 (8th Cir.), cert. denied, 423 U.S. 864 (1975).

IV.

THE SETTLEMENT HEARING

The purpose of a settlement hearing is to enable the trial court to assess the adequacy of the proposed settlement. As expressed by one Federal appeals court: "While we do not expect the district judges to convert settlement hearings into mini-trials on the merits, we do expect them to explore the facts sufficiently to make intelligent determinations of adequacy and fairness." Malchman v. Davis, 706 F.2D 426, 433 (2d Cir. 1983). And, as the court stated in Newman v. Stein, 464 F. 2d 689, 692 (2d Cir.), cert. denied, 409 U.S. 1039 (1972), "the court must not turn the settlement hearing into a trial or a rehearsal of the trial."

At the hearing, Donald Franklin, Deputy Comptroller, was called by the City as a witness. Mr. Franklin testified that one of his duties is to supervise the City's insurance and benefits program. Franklin

described what has happened with the City's expenditures for annuitant health care over the past decade, during which period the total cost of annuitant health care has skyrocketed from $6.3 million in 1980 to an estimated $46.6 million in 1989. In 1980, the City was spending $1.9 Million for annuitant health care and in 1989 its projected expenditure for annuitant health care is $35.7 million, an increase of 1800%. Stated in percentages, in 1980 the City was paying 31% of the total while the annuitants were paying 69%. By 1989, these percentages had reversed, with the City paying 77.5% of the total cost while the Funds paid 9% and the annuitants 13.5%.

Franklin also explained that almost 36% of the affected annuitants will pay nothing for their coverage in 1990 because they are medicare eligible and the $70 cost is covered by the Funds' $35 subsidy and the City's payment of the other 50% of the cost. Another 19% of the annuitants (two Medicare-eligible individuals) will pay only $14 per month more

than at present. On cross examination, Franklin acknowledged that the rates for each category were not required to be set in this fashion. In fact, the agreement gives the City discretion to categorize the annuitants in any logical fashion and to allocate the costs thereof in any reasonable fashion.

Ten annuitant witnesses testified, explaining their opposition to the settlement. Eight of the ten witnesses wre retired policemen (or their widows). One Municipal Fund annuittant and one retired laborer also testified. The Court listened attentively, with compassion and understood their objections.

A number of the police annuitants testified that they had attended a pre-retirement seminar at which they had been advised that their health care would be paid for by the City "for life." Based on these representations, which some of the witnesses believed created a contractual obligation on the part of the City, the annuitants testified

that the proposed settlement is unfair. This Court must consider the merits of this alleged contractual obligation and the annuitants' likelihood of establishing the City's liability on the basis if the case were to be adjudicated to a final judgment.

A few of the witnesses testified to their belief that under the proposed agreement they would have no coverage at all after 1997. As noted above, this is simply incorrect. The City and the Funds have agreed that at the conclusion of the 10 years covered by the settlement the parties will return to the same positions they were in before the proposed settlement was negotiated. In the words of the stipulation between the City and the Funds, which was read into the record before this Court on November 27, 1989:

> On January 1, 1998, the parties will be in the same legal positions they were in as of June of 1988. To the extent the City had any obligation

in June of 1988, they will have that same obligation or obligations on January 1, 1998.

Consequently, the annuitants have not "given up" anything through this settlement. (Other than the claimed right to have the City pay more than 50% of the costs between March of 1990 and December of 1997.) On January 1, 1998, if some "permanent solution" has not been achieved, the annuitants will be permitted to reargue the claims which were asserted in the Funds' Counterclaims as well as the Intervenors' initial pleading.

This confusion as to what will happen after 1997 was reflected as well in the annuitants' general lack of knowledge as to the underlying litigation. For example, one annuitant testified that he was unaware that in 1987 the City announced it was going to drop all annuitants from the health care plan and that he was generally unfamiliar with the terms of the settlement or the underlying

litigation. A second annuitant similarly did not recall that in June of 1988 the City took the position that it did not have to pay anything for annuitant health care. Another annuitant testified that he did not know what happens if the Court rejects the settlement and stated it would be "financial ruin" for him if the annuitants lost the case on the merits. In evaluating the opinions of such individuals as to the fairness of the settlement, this Court should take into consideration their misunderstanding of the complexity of the underlying litigation and the legal issues involved therein.

Finally, most of the annuitant witnesses testified that the proposed settlement was unfair because it simply cost too much. The Funds and the Court are sympathetic with the plight of annuitants who will find it a real hardship to pay the increased rates which have been set by the City. Nonetheless, the dollars involved are only peripherally relevant to this Court's determination of the

fairness of the settlement. The major premise of the settlement is that the City will pay at least 50% of the cost of the annuitants' health care with the Funds' subsidies defraying a portion of the annuitants' share of the cost. There is no real dispute as to the amount of the actual cost of annuitant health care at the present time; the issue instead is who pays for it and whether the 50/50 sharing arrangement set forth in the proposed settlement is in the best interests of the annuitants generally. The Funds believe that only one conclusion can be drawn, and the Court agrees: In light of the risk that the City might prevail in its position that it has no legal obligation to provide or pay for annuitant health care, this proposed settlement is eminently fair and reasonable and should be approved by this Court.

CONCLUSION

AND

ORDER

The Court taking all of the evidence in its totality and having reviewed all of the briefs finds that the proposed settlement is clearly in the interest of the Class and the Parties and that all criteria covering the approval of class action settlements have been satisfied.

Further, the Court having found the proposed settlement to be fair, it need not address the Participant Class' motion for summary judgment and its motion for a permanent injunction.

ENTERED:

December 12, 1989
DATE

/S/Albert Green
Hon. Albert Green
Circuit Court 0129

Page

Appendix C 48-64

Illinois Appellate Court Opinion of November 28, 1990
trial court approval of settlement agreement is affirmed 48-64

THIRD DIVISION
November 28, 1990

NOTICE
The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-89-3451

THE CITY OF CHICAGO, a municipal corporation, Plaintiffs-Counterdefendant-Appellee,	)	
v.	)	APPEAL FROM THE CIRCUIT COURT
MARSHALL KORSHAK, et al., Defendant-Counterplaintiffs-Appellees,	)	COOK COUNTY.
	)	HONORABLE ALBERT GREEN J U D G E PRESIDING.
MARTIN RYAN, WALTER RUCINSKI, BERNARD McKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH, AND KATHERINE DOYLE, Intervenors-Appellants.	)	

JUSTICE RIZZI delivered the opinion of the court:

Intervenors-Appellants martin Ryan et al. (Intervenors), class representatives of the participants in the City of Chicago (City's) annuitant health care program, appeal from an order of the trial court which approved the class action settlement agreement proposed by the City and the trustees of four City pension funds (the Funds). We affirm.

The City of Chicago's retired employees are covered by four annuity and benefit funds: the Policemen's Annuity & Benefit Fund, the Firemen's Annuity & Benefit Fund, Municipal Employees' Officers' and Official's Annuity Fund and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund. Beginning in 1964, the Funds' annuitants were allowed to participate in a medical benefits plan sponsored by the City under the same coverage and premium rates offered to current City employees. In 1965, the City began paying the cost of its active employees' medical insurance coverage and, in 1971, the City paid the cost of its employees'

dependents' medical insurance coverage. The medical insurance for active employees, annuitants and dependents were provided through traditional insurance policies until 1975 when the City became self-insured. The City then paid Blue Cross, Bankers Life and Home Pharmacy insurance companies to administer its insurance program.

When the annuitants first joined the City's plan in 1964, the premium rates charged for an individual annuitant under age 65 was $8.04 per month. The premiums were periodically increased. By 1977, when the coverage was self-insured, the monthly rate charged by the City for a single annuitant under age 65 had increased to $38.26.

Prior to 1980, the annuitant beneficiaries paid the entire cost of their health care. That year, the City contributed $2,000,000 toward the cost of beneficiaries' health insurance. The payment constituted 31% of the total cost of health care benefits. The City increased the rates charged the

annuitants effective April 1982. Since 1982, Medicare-qualified annuitants have paid $21 per month while others have paid $55 per month for health care benefits. The rates have not risen since 1982 and as a result, the City has had to cover the escalating costs of the pensioners' policies. By 1989, the City was paying 77% of the health care costs. Prior to 1983, the Funds did not pay any of the cost of annuitants' health benefits. In October 1987, the City informed the Funds of its intention to cease payment of annuitants' health care benefit costs as of December 31, 1987.

The dispute in this case arises out of the subsequent complaint for mandamus, restitution and other relief filed in 1987 by the City against trustees of the Funds to recover payments made for a portion of pension fund beneficiaries' health care costs. State law specifies the monthly amounts the City is to raise through its tax levy for the cost of beneficiaries' health care and the rest of the cost is paid by the beneficiaries who want

coverage. The City's lawsuit sought both an order declaring how much the City must pay and the recovery of prior "illegal" payments. The Funds' trustees responded to the City's suit by filing a motion to dismiss and a counterclaim on behalf of their annuitants to prevent the City from terminating the annuitants' coverage under the City's Plan and to compel the City to continue paying for a portion of the coverage. Certain individual annuitants, who are the appellants in this matter, were granted leave to intervene in the trial court proceedings.

Following a hearing, the trial court dismissed the City's complaint with prejudice finding that the Funds had no obligation to reimburse the City for the health care benefits received by the annuitants since 1980. The claims asserted in the Funds' counterclaims were the subject of a June 1988 bench trial. Before the trial court issued its decision, however, the City and the Funds agreed to support legislation amending the

Pension Code and to enter into a settlement agreement consistent with the legislation. The terms of the settlement agreement provide that the City pay at least 50% of the cost of health care claims of annuitants and dependents who participate in the City's plan. The legislation further provides that the City's obligation to continue coverage under the legislation will terminate at the end of 1997, but that, in the event that some permanent solution is not achieved by 1998, the annuitants will be permitted to assert whatever legal rights they had at the time the trial of the counterclaims commenced.

Intervenors filed a motion for summary judgment asking the trial court to permanently enjoin the City from changing the terms of the health care benefits provided to annuitants. The trial court held a fairness hearing on November 27, 1989, wherein it approved the settlement and thus decided not to rule on the Intervenors' motion for summary judgment. This appeal followed. On February 14, 1990,

this court granted the Intervenors' motion to stay pending appeal, implementation of the trial court's order which approved the settlement.

On appeal, the Intervenors' contend that the trial court abused its discretion in approving the class action settlement. We disagree. The procedural and substantive standards governing class action settlement hearings are well established. On appeal, the trial court's decision may be reversed only on a clear showing that the trial court was guilty of an abuse of discretion. People ex rel. Wilcox v. Equity Funding Life Insurance Co. (1975), 61 Ill. 2d 303, 316 N.E.2d 448, 455. A trial court's approval of a settlement should not be overturned on appeal unless, taken as a whole, the settlement appears on its face so unfair as to preclude judicial approval. Gowdey v. Commonwealth Edison Co. (1976), 37 Ill. App. 3d 140, 149-50, 345 N.E.2d 785, 793.

The determination of whether a settlement is fair, reasonable and adequate requires the examination of an amalgam of factors, the principle factor is a balancing or comparison of the terms of the compromise with the likely rewards of litigation, as well as a determination of whether the settlement is in the best interests of all those who will be affected by it. Wilcox, 61 Ill. 2d at 316. Although review of class Action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. Among the factors which the trial court should consider in judging the fairness of the proposal are the following:

(1) the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement;

(2) the defendant's ability to pay;

(3) the complexity, length and expense of further litigation;

(4) the amount of opposition to the settlement;

(5) the presence of collusion in reaching a settlement;

(6) the reaction of members of the class to the settlement;

(7) the opinion of competent counsel

(8) the state of proceedings and the amount of discovery completed. Armstrong v. Board of School Directors, et al. (7th Cir. 1980), 615 F.2d 305, 314.

We will review the trial court's approval of the settlement agreement using the above noted factors. The first factor is the strength of the case versus relief offered in settlement. In assessing the fairness, reasonableness and adequacy of the settlement, the trial court balanced the amount of the proposed settlement and the immediacy of a prospective recovery for class members against the continuing risks of litigation. The trial court found that the risks in the case primarily involve the establishment of the

City's liability for the cost of its retired employees' health benefits. The settlement eliminates the risk that the Funds and the annuitants will not be successful in establishing liability. Throughout the litigation, the City maintained the position that it was legally entitled to terminate both the annuitants' participation in the City's health benefits plan as well as its payment of any of the costs for those benefits.

Here, by contrast to the usual class action settlement, the Funds and annuitants have not sued for money damages and are not settling for some percentage of their actual damages. Instead, the proposed agreement eliminates the risk that the annuitants would have to pay the entire cost of their health benefits and the further and more serious risk that they may not be able to obtain coverage at any price. The agreement eliminates these risks by committing the City to pay at least 50% of the cost of the annuitants' health benefits through the end of 1997. At the

conclusion of that period, if no permanent solution has been found, the parties will return to the legal postures they were in in June of 1988, before this compromise was negotiated.

The second factor is the defendant's ability to pay. The trial court found that under the circumstances of this case, this factor was not relevant. We agree.

The third factor is the complexity, length and expense of further litigation. On this point, the court found that this case presented the kind of dispute where a fair and reasonable settlement would be beneficial to all parties concerned and to the public interest. If the agreement were not approved, the litigation would return to the posture it was in in June of 1988 when the parties reached a settlement in principle. During the post-trial stage and probably appeal process, the annuitants' health benefits would remain in limbo, both as to coverage and liability for payment of the cost of coverage. This

settlement resolves these issues in the best interests of both the class and the public.

The fourth factor is the amount of opposition to the settlement. This factor and the sixth factor are closely related. We will therefore discuss the fourth factor in conjunction with our discussion of the sixth factor. The fifth factor is the presence of collusion. In this regard, the trial court noted that it had the opportunity to acquaint itself fully with the facts and law of the case and was aware of the procedural aspects of the litigation. The trial court found that the case was hard fought by both counsel for the City and the Funds and that settlement was reached after vigorously contested litigation and hard bargaining. The trial court therefore concluded that there was on collusion in conjunction with either the litigation or bargaining which preceded the agreement. We agree.

The six factor is the reaction of members of the class to the settlement. The trial

court balanced the objections of class members against the strengths and weaknesses of the case and the risks of litigation and found the settlement agreement to be manifestly reasonable. Several annuitants complained that as a result of the settlement they would be obligated to pay unaffordable premiums. Although the premiums will substantially increase under the plan, the City is obligated to pay at least 50% of the total $340 actual cost per month for annuitant coverage. Because this settlement eliminates the possibility that the annuitants will not prevail on the merits and obligates the City to pay at least 50% of the annuitants' health benefits coverage until the end of 1997, it is in the best interests of all parties. Furthermore, in oral argument before this court, counsel for the City indicated that the City has promulgated a municipal ordinance which obligates it to pay 62.5% of annuitants' health care costs.

The seventh factor is the opinion of competent counsel. The trial court did not separately consider this point, but noted within the context of discussing the arms length negotiations which lead to settlement that counsel for both sides reach agreement only after hard bargaining. The trial court therefore relied on the opinion of competent trial counsel who approved the agreement.

The eighth factor is the state of proceedings and the amount of discovery completed. The state of proceedings at which settlement is reached is important because it indicates the extent to which the trial court and counsel were able to evaluate the merits of the case and assess the reasonableness of the settlement. The proposed settlement in this case was entered into after all discovery was completed and a trial had been conducted on the pension funds' counterclaim. We therefore conclude that the trial court and the parties had all the information necessary to evaluate the merits of the parties' legal

positions and the probably course of future litigation.

Under the circumstances, reviewing the facts in their entirety in the light most favorable to the settlement, we find the agreement to be both reasonable and in the best interests of all concerned parties. In reaching this conclusion, we defer to the trial court's decision in this matter. This defence is accorded the trial court because of its familiarity with the litigants, the history of the litigation and the merits of the substantive claims asserted. See Armstrong, 616 F.2d at 315.

Intervenors raised numerous additional challenges to the settlement agreement. The Intervenors claims that (1) notice to the participant class was defective and confusing; (2) the class representatives were prevented from communicating to the class; (3) the court erroneously precluded intervention by entities having vital interests to the determination of fairness; and (4) the settlement is unfair and

should be rejected. Upon review, however, we find the Intervenors' challenges to be without merit.

On the issue of notice, each of the approximately 16,000 annuitants and widows of annuitants who participate in the City health benefits plan were given notice of the proposed settlement and fairness hearing. The notice informed the class members of their right to appear at the fairness hearing and to enter appearances through the own counsel, if desired. The notice which fully an explicitly explained the litigation, the proposed settlement and the rights and options of the class members complied with due process. Further, although the trial court denied the Intervenors' request that they be permitted to include, with the court-approved notice, a statement explaining their opposition to the settlement, they failed to appeal from that order. Accordingly, review of that order was waived. In addition, Intervenors failed to appeal from the trial court's order denying

intervention to the Retired Chicago Police Association, therefore precluding review of that order. See Ill. Rev. Stat. 1987, ch. 110A, par. 301; Lewanski v. Lewanski (1978), 59 Ill. App. 3d 805, 815, 375 N.E.2d 961, 968-69.

In sum, the Intervenors' challenges to the settlement agreement are without merit. Further, our independent review of the settlement agreement using the Armstrong criteria for approval of class action settlements leads us to conclude that the trial court did not abuse its discretion in approving the agreement.

Accordingly, the judgement order of the trial court which approved the settlement agreement in this matter is affirmed.

AFFIRMED.

CERDA, P.J., and WHITE, J., concur.

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Appendix D 65-78

Illinois Public Act 86-273 65-78

(Ch. 108 , par. 5-167.4) [S.H.A. ch. 108 , 167.4]

5-167.4. Widow annuitant minimum annuity. The minimum amount of the widow's annuity for any widow who is age 50 or older and who is otherwise entitled to a widow's annuity under this Article is $200 ~~$150~~ per month, without regard to whether the deceased policeman was in service on the effective date of this amendatory Act of 1986.

Effective January 1, 1990 ~~1986~~, the minimum amount of widow's annuity shall be $400 ~~$325~~ per month for the following classes of widows, without regard to whether the deceased ~~the fact that the death of the~~ policeman was in service on ~~occurred prior to~~ the effective date of this amendatory Act of 1989 ~~1985~~: (a) the widow of a policeman who dies in the service with at least 10 years of service credit at date of death in the

service, or who dies in the service after June 30,1981; and (b) the widow of a policeman who withdraws after 20 or more years of service and does not withdraw a refund, provided the widow is married to the policeman before he withdraws from the service.

The city, in addition to the contributions otherwise made by it under the other provisions of this Article, shall make such contributions as are necessary for the minimum widow's annuities provided under this Section in the manner prescribed in Section 5-175.

(Ch. 108 , par. 5-167.5) [S.H.A. ch. 108 , 5-167.5]

5-167.5. Group health benefit. (a) For the purposes of this Section, "annuitant" means a person receiving an age and service annuity, a prior service annuity, a widow's annuity, a widow's prior service annuity, or a minimum annuity on or after January 1, 1988, under Article 5, 6, 6 or 11,(fn omitted) by reason of previous employment by the City of

Chicago (hereinafter, in this Section, "the city").

(b) The city shall continue to offer to annuitants and their dependents the same basic city health care plan available as of June 30,1988 (hereinafter called the basic city plan), and may offer additional plans at its sole discretion.

(c) Effective the date the initial increased annuitant payments pursuant to subjection (g) take effect, the city shall pay 50% of the aggregated costs of the claims or premiums, whichever is applicable, of annuitants and their dependents under all health care plans offered by the city. The claims or premiums of all annuitants and their dependents under all of the plan offered by the city shall be aggregated for the purpose of calculating the city's payment required under this subjection, as well as for the setting of rates of payment for annuitants as required under subsection (g).

(d) From January 1, 1988 until December 31, 1992, the board shall pay to the city on behalf of each of the board's annuitants who chooses to participate in any of the city's plans the following amounts: up to a maximum of $35 per month for each such annuitant who is qualified to receive medicare benefits. From January 1, 1993 until December 31, 1997, the board shall pay to the city on behalf of each of the board's annuitants who chooses to participate in any of the city's plan the following amounts: up to a maximum of $75 per month for each such annuitant who is not qualified to receive medicare benefits, and up to a maximum of $45 per month for each such annuitant who is qualified to receive medicare benefits.

For the period January 1, 1988 through the effective date of this amendatory Act of 1989, payments under this Section shall be reduced by the amounts paid by or on behalf of the board's annuitants covered during that period.

The payments described in this subsection shall be paid from the tax levy authorized under Section 5-168; such amounts shall be credited to the reserve for group hospital care and group medical and surgical plan benefits, and all payments to the city required under this subsection shall be charged against it.

(e) The city's obligations under subsections (b) and (c) shall terminate on December 31, 1997, except with regard to covered expenses incurred but not paid as of that date. This subsection shall not affect other obligations that may be imposed by law.

(f) The group coverage plans described in this Section are not and shall not be construed to be pension or retirement benefits for purposes of Section 5 of Article XIII of the Illinois Constitution of 1970.

(g) The aggregate cost of claims and premiums for each calendar year from 1989 through 1997 of all annuitants and dependents covered by the city's group health care plans

shall be estimated by the city, base upon a written determination by a qualified independent actuary to be appointed and paid by the city and the board. If such estimated cost is more than the estimated amount to be contributed by the city during that year plus the estimated amounts to be paid pursuant to subsection (d) and by the other pension boards on behalf of other participating annuitants, the difference shall be paid by all participating annuitants. The city, based upon the determination of the independent actuary,shall set the monthly amounts to be paid by the participating annuitants. The initial determination of such payments shall be prospective only and shall be based upon the estimated costs for the balance of the year. The board may deduct the amounts to be paid by its annuitants from the participating annuitants' monthly annuities.

(h) An annuitant may elect to terminate coverage in a plan at any time, which election shall terminate the annuitant's obligation to

contribute toward payment of the excess described in subsection (g).

~~Group health benefit. (a) For the purposes of this Section:~~

~~"Annuitant" means a person receiving an age and service annuity or a prior service annuity under this Article on or after January 1, 1983.~~

~~"Carrier" means an insurance company, or a corporation organized under the Nonprofit Hospital Service Plan Act, the Medical Service Plan Act or the Voluntary Health Services Plan Act, which is authorized to do group health insurance business in Illinois.~~

~~(b) The Board shall contract with one or more carriers to provide group health insurance for all annuitants. Such group health insurance shall provide for protection against the financial costs of health care expenses incurred in and out of hospital including basic hospital surgical medical coverages and major medical coverage. The program may include such supplemental~~

~~coverages as out patient diagnostic X-ray and laboratory expenses, prescription drugs and similar group benefits.~~

~~The group health insurance program may also include:~~

~~(1) prepaid preventive health care through health maintenance organization;~~

~~(2) coverage for those who rely on treatment by prayer or spiritual means alone for healing in accordance with the tenets and practice of a recognized religious denomination;~~

~~(3) optional coverage for dependents of the annuitant;~~

~~(4) other optional coverage, such as for dental, psychological, or optometric services.~~

~~(c) The group contract shall be on terms deemed by the Board to be in the best interest of the Fund and its annuitants, based on, but not limited to, such criteria as administrative cost factors, the service capabilities of the carrier, and the premiums charged.~~

~~The term of any contract made under authority of this Section may not extend beyond 2 fiscal years, with such renewal options, for not more than 2 one year periods, as may be deemed by the Board to be most advantageous to and in the best interest of the Fund and its annuitants. No renewal may be exercised without the conclusion of a qualified independent actuary and that any increase in premium requested by a carrier is justified on the basis of audited experience data, increases in the cost of health care services, carrier performance, or any combination thereof.~~

~~(d) The Board shall pay the premiums for such health insurance for each annuitant with funds provided as follows:~~

~~The basic monthly premium for each annuitant shall be contributed by the city from the tax levy prescribed in Section 5-168, up to a maximum of $55 per month if the annuitant is not qualified to receive medicare benefits, or up to a maximum of $21 per month~~

~~if the annuitants is qualified to receive medicare benefits.~~

~~If the basic monthly premium exceeds the maximum amount to be contributed by the city on his behalf, such excess shall be deducted by the Board from the annuitant's monthly annuity, unless the annuitant elects to terminate his coverage under this Section, which he may do at any time. The full cost of any optional coverage elected by the annuitant shall be deducted from his monthly annuity.~~

(Ch. 108 , par. 5-178) [S.H.A. ch. 108 , 5-178]

5-178. Board created. A board of 8 ~~9~~ members shall constitute a board of trustees authorized to administer the provisions of this Article. The board shall be known as the Retirement Board of the Policemen's Annuity and Benefit Fund for the city.

The board shall consist of ~~the city treasurer~~ 4 persons appointed by the mayor of the city; 3 policemen employed by the city, at

least one of whom shall be a lieutenant or of a rank superior to lieutenant; one of which shall be of the rank of sergeant, and one of whom shall be of the rank of investigator or a rank inferior to that rank; and one annuitant of the fund, or a pensioner of any prior police pension fund in operation, by authority of law, in the city. Children less than age 18 shall not be eligible for board membership. The term of office for all members~~, other than the city treasurer,~~ shall be 3 years. Upon his election, the member holding the rank of investigator or a rank inferior to that rank shall be detailed by the Police Superintendent to the office of the board for the duration of his term as trustee.

The members of a retirement board holding office in a city at the time this Article becomes effective, including elected, appointed and ex-officio members, shall continue in office until the expiration of their respective terms or appointment and

until their respective successors are elected or appointed, and qualified.

At least 30 days prior to the expiration of the terms of office of each appointive member the may shall appoint a successor for a term of 3 years.

The board shall conduct a regular election at least 30 days prior to the expiration of the terms of the active policemen members and annuitant or beneficiary members for election of a success for of each such member for a term of 3 years.

Any member of the board so appointed or elected shall continue in office until his successor is elected and has qualified.

Any person so appointed or elected shall qualify by taking an oath of office. A copy thereof shall be kept in the office of the city clerk of the city.

(Ch. 108 , par. 5-212) [S.H.A. ch. 108 , 212]

5-212. Computation of service. In computing the service rendered by a policeman

prior to the effective date, the following periods shall be counted, in addition to all periods during where he performed the duties of his position, as period of service for annuity purposes only: all periods of (a) vacation; (b) leave of absence with whole or part pay; (c) leave of absence without pay on account of disability; and (d) leave of absence during which the policeman was engaged in the military or naval service of the United States of America. Service credit shall not be allowed for a policeman in receipt of a pension on account of disability from any pension fund superseded by this fund.

In computing the service rendered by a policeman on or after the effective date, the following periods shall be counted, in addition to all periods during which he performed the duties of his position, as periods of service for annuity purposes only; all periods of (a) vacation; (b) leave of absence with whole or part pay; (c) leave of absence during which the policeman was engaged

in the military or naval service of the United States of

Additions in text are indicated by underline; deletions by ~~strikeouts~~

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Appendix E 79-93

Detailed Statement of Facts 79-93

Detailed Statement of Facts

Petitioners are the certified class of participants in the City of Chicago's Annuitant Healthcare Program, as of December 31, 1987 (the "participants" or the "1987 class").

Since approximately 1964, many of the City's annuitants participated, with active City employees, in a group medical benefits program sponsored by the City. Stip. No. 5, R.C 1106. The City has been paying a portion of the costs of the annuitants' medical benefits since the mid-1970's. Stip. 9 R.C1107. Since 1982[1] the City's Annuitant Healthcare Plan has been represented to

[1]Although it was not known to participants at the time of the June 1988 hearing in this case, it was subsequently discovered that the lifetime health care plan was implemented in 1982 as a way to accomplish the equivalent of a pay raise without the recipients having to pay income tax on it or the City having to ask for a tax increase for two years thereafter. McDonough Affidavit (Supplementary Appellate Record).

employees and retirees as lifetime coverage[2] for annuitants, their spouses and families; the City charging for that coverage $21 per month for Medicare-qualified individuals, $55 per month for others, an amount equal to the tax levy specified by each funds financing provisions for this purpose.[3] Under the applicable Illinois Pension Code provisions, and pursuant to representations by the Funds, the Police and Fire Funds paid the entire

[2]The City's plan was self-insured, meaning that it paid the claims itself rather than purchasing coverage from a third party carrier; although the plan was administered by third party administrators such as Blue Cross, Bankers Life, etc. Further, the coverage is a typical plan, under which, in general, participants pay for their costs up to the $100 "deductible," then share costs with the City 20/80, up to a $7,500 ceiling, after which "major medical" coverage applies up to a $1 million lifetime maximum. R.C2920-2959, Supplemental Appendix 4.

[3]Although the statutes then in effect stated that the Funds would procure the coverage through a third party carrier and receive reimbursement in the specified amounts from the City, the arrangement was done by the City acting as the self insured carrier, charging as the coverage premium the exact amount of the pension fund subsidy, which was financed as part of the annual tax levy.

premium for their qualified annuitants, and the Municipal and Laborers Funds paid a premium of up to $25 per month for their annuitants.[4] Annuitants were thus generally required to themselves pay only the premium for additional coverage for spouses and other family members.[5]

The City routinely and repeatedly informed its active employees during their employment that such lifetime post-retirement coverage was part of their compensation package.[6] This was well understood by City workers, who generally regarded this as a

[4]Illinois Pension Code (Ch. 108-1/2) 5-167.5, 6-164.2, 8-164.1 and 11-160.1, as effective until amended by P.A. 86-273, eff. August 23, 1989. And the Funds routinely advised the employees prior to and in retirement that this premium subsidy would be paid throughout retirement by the Fund.

[5]Municipal and Laborer participants who were not Medicare qualified generally paid only for those premiums in excess of the subsidy.

[6]Supplemental Record, Annuitant testimony at June 1988 trial itemized at Appendix 6, paras. 25 and 26 and see Kordeck and McDonough Affidavits, Supplemental Appendix Nos. 14 and 15.

primary benefit of their employment. Id. at par. 27.

City Files Suit to Stop Paying for Health Care Benefits. In late 1986, in another case, the Illinois Appellate Court ordered the City to make full restitution for wrongfully using Pension Tax levies to earn interest for itself, rather than the City's Pension Funds.[7] Shortly thereafter, in early 1987, certain City officials concluded that the City's Ryan restitution obligation could exceed $25 million and met to devise a way to offset it.[8]

The Administration's Game Plan. They admittedly devised a "game plan", to approach the Pension Funds' trustees, asserting that the City had wrongfully paid for annuitant health care coverage over the previous seven

[7] Ryan v. Chicago, 148 Ill.App.3d 638, 499 N.E.2d 517, (1st Dist. 1986), cert. denied, 505 N.E.2d 361.

[8] Appendix 20, Supplemental Record, Picur testimony at 118-119 and Gilliam testimony at 19ff.

years, demand back the $58-85 million previously paid out for claims, but offer to waive the repayment if the trustees would waive their "Ryan" claim for the usurped earnings. Id. When the trustees refused, the City filed suit against the trustees of the four affected City Pension Funds ("the trustees") in the Circuit Court of Cook County, Illinois, City of Chicago v. Korshak, et al., No. 87 CH 10134, ostensibly seeking a declaration that it had unlawfully paid for annuitant health care coverage in the past years, demanding to recover the City's past payments under the Plan, and mandamus to require the trustees to take over the coverage without City assistance. R.C2. The trustees moved to dismiss, R.C11, and later counterclaimed R.C24-82, and 178-83. Petitioners, individual participants in the Annuitant Healthcare Plan, immediately intervened on behalf of the participant class, R.C13, 215-7, 341-54, and thereafter actively asserted the participants interests, although

the intervention was not formally granted until May 5, 1988. R.C793. The City sought to consolidate this case with the Ryan case, claiming them to be related, but was denied on the participants' opposition. December 9, 1987, R.C23, Appendix 10. The intervenors' motions for class certification were repeatedly delayed, continued, but renewed, R.C681, 528, and 1542, and eventually granted on October 11, 1989, R.C1602 and the case was certified as a class action with the intervenors as the representatives for the class of those participants as of December 31, 1987.[9]

[9]A separate case is pending in federal court dealing with the post-1987 retiree participant class only. Retired Chicago Police Assn. v. City of Chicago, U.S. Dist. Ct. N.D. Ill.E.D. No. 90 C 407, before The Honorable Suzanne Conlon. Judge Conlon's September 10, 1991 opinion denying the City's and Funds' res judicata motion against the post-1987 class, itself questioning the binding effect the decision hereinbelow, is contained in Appendix E.

Injunction at Trial Court Level. The circuit court issued injunctions pendente lite[10] enjoining the City from discontinuing or changing the terms of the City's Annuitant Healthcare Plan while the case was pending. R.C388, 662.

Dismissal of the City's Complaint. The Court eventually dismissed the City's Complaint, but refused to dismiss the counterclaims filed by the trustees and participant intervenors seeking to force the City to continue the coverage. May 16, 1988, R.C860

Trial. During June 1988, the trial court held a hearing on the motions for preliminary injunction against the City's changing the coverage. Substantial evidence was introduced showing that the City's plan to cut off the health care coverage for annuitants was (1) contrary to the City's repeated

[10]Court's Orders of December 15, 1987, January 29, 1988 and March 29, 1988. R.C94, 388, and 662.

representations in Plan handbooks to annuitants (Stip. 19, R.C1109) and presentations given in numerous City-sponsored pre-retirement seminars designed to apprise employees of their lifetime retirement health care benefits;[11] and (2) adopted in retaliation and as a bargaining ploy to offset the effect of the Illinois Appellate Court's order to the City to stop its unlawful use of pension tax levies. Ryan v. City of Chicago, 148 Ill.App.3d 638, 499 N.E.2d 517 (1st Dist. 1986). (Supplemental Record, Gilliam Testimony at 19ff and Picur Testimony at 144.)

"Settlement" Between City and Trustees. Following the hearing, but before the Court's decision, the City and the trustees reached a "settlement" (the Agreement) between themselves which they intend to implement over the unanimous objection of the intervenors

[11]Participants Testimony on June 21, 1988, Supplemental Record, Annuitants Objections at R.C2599 through 3479, and testimony at November 27, 1989 Fairness Hearing.

participant class and its representatives. Under the Agreement, the City and the trustees agreed to have the Illinois Pension Code changed. R.C2157-2159. The legislation was incorporated into P.A. 86-273, enacted August 23, 1989. R.C1602. Its effect is to cut the City's contribution to the health care coverage by half through 1997, increase the Funds' contribution slightly during the same period, and end both the City's obligation to provide coverage and the Funds' authority/obligation to subsidize coverage costs after 1997. P.A. 86-273. This results in major increases in the health care costs charged fixed income annuitants -- in the first year alone as much as 375%, elimination of the Funds' subsidy after 1997 and no assurance of coverage thereafter.

Objections by Participants. The participant class representatives objected to the settlement, and asked the Court to instead decide the case and grant the participants summary judgment and a permanent injunction

against the City from changing the terms of annuitant health care for existing participants. R.C1542. The Court deferred ruling on their motions, deciding it would first rule on the fairness of instead implementing the agreement between the City and the Pension Funds' trustees. R.C1602 October 11, 1989, and November 21, 1989, proceedings and ruling R.Vol. 5, Item No. 12, R.C3521. The Retired Chicago Police Association, an association of retired policemen and their families sought to intervene as did George Gannon, a retired policeman. Gannon's intervention was permitted; the association's was denied. R.C1602 October 11, 1989.

Pre-Fairness Hearing. Notice, R.C1605, albeit in a form objected to by the participants' class counsel (Supp.R 7 (10/30/89) R.C1605) was sent to the pre-1988 class advising them of the hearing. R.C1660. Class counsel objected to the form of the notice, proposed an alternative notice, and

requested permission to include an explanation of class counsel's position and to enclose a response sheet to obtain participants' views on the settlement. All of these were denied. Supp. R7 October 30, 1989. R.C16240. The class counsel subsequently became aware of, and brought before the court, the fact that during the settlement opt-out period prior to evaluation by the court, the City intended to send letters out to annuitants without prior court approval, advising them of its intent to raise their rates effective March 1, 1990, and including language favoring the settlement. R.C1635-48. Counsel's motion to stop or correct the letter sent was also denied. R.C1649.

The Fairness Hearing. The trial court held the fairness hearing on November 27, 1989.[12] At the fairness hearing, no

[12]Fairness Hearing, Report of Proceedings at R. Vol. 5 (generally referred to as "Fairness Hearing Transcript at #" or "Fairness Hearing at #").

annuitant testified in favor of the settlement, in spite of the trustees' vigorous efforts to solicit such testimony. (Fairness Hearing, at 120.) Only one witness, a City official, testified for the City and Funds in favor of the settlement. (Donald Franklin, Fairness Hearing at 32-64.)[13] The president of the Retired Chicago Police Association testified against the settlement, but was barred from testifying in his representative

[13]At the completion of the fairness hearing, and in response to objections by the participant class, the City and the trustees entered into an additional stipulation by which the City and Funds agreed to use their best efforts to negotiate a permanent resolution of the annuitant health care problem, failing which the parties would be restored to whatever rights they had prior to the litigation. Fairness Hearing at 146-8. The City previously refused to accept the annuitant class' demand for such a provision, and still refuses to voluntarily negotiate or continue coverage after 1997. Moreover, the legislation completely eliminates the Pension Funds' subsidy after 1997, and the trustees acknowledge that the law would not permit their paying anything after 1997. There is however, no basis in the amended statute which would require any post-1997 payments by the City or permit any to be made by any of the Funds. P.A. 86-273.

capacity. R.C67-8 and 70. Similarly, Messrs. Dineen and Holland, the leaders of the unions which are the bargaining representatives for police and firemen (and whose members include affected annuitants) were also barred from testifying. Fairness Hearing at 103-105.

Counsel for the class tendered some 500 written letters from annuitants, virtually unanimous in their opposition to the settlement and the rate increases it would produce. R.C2599-3480, see also R.C2105, 2107, 1650-51, 1655-58, 1665.

Approval of Settlement and Dismissal of Motion for Injunction. On December 12, 1989, the court approved the proposed settlement, over the objections of all the participant class representatives, all class counsel, live testimony by ten[14] individual participants and the some 500 written objections received

[14]The trial court limited testimony to ten typical annuitants and refused to permit the intervention and/or testimony by representative witnesses entirely. Fairness Hearing Transcript at 66-68, 103-105.

from participants. R.C Vol 5 no. 13. On December 15, 1989, the court, again over the objections of the participant class representatives and class counsel, ordered implementation of the settlement terms and dismissed the participant class representatives' request for a permanent injunction against the City changing the terms of coverage for existing health plan participants, and the class' request for Stay pending Appeal. R.C Vol. 5 no.8.

Stay and Injunction Pending Appeal. The participant class representatives appealed the decision to the Illinois Appellate Court. On February 14, 1990, the Appellate Court granted the class' motion for stay and enjoined the City from changing the terms of the Plan while the appeal was pending.

Appellate Court Decision. On November 28, 1990, the Appellate Court issued affirmed the Circuit Court in the view that the settlement terms were fair. City of Chicago v. Korshak, 206 Ill.App.3d 968, 565 N.E.2d 68

(1st Dist. 1990). The participants petitioned for rehearing, pointing out that the Appellate Court had failed to address the procedural due process defects and the unconstitutionality of the settlement's terms. On January 15, 1991, the Appellate Court declined to rehear the case. On June 5, 1991, the Illinois Supreme Court denied the participants' timely-filed petition for leave to appeal; and on July 26, 1991, refused petitioners' request for leave to petition for reconsideration.

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Appendix F 94-123

Related Case Decisions from
Retired Chicago Police Ass'n. v.
City of Chicago, U.S. Dist. Ct.
(N.D. Ill. E.D.), No. 90 C 407

Court Memorandum Opinion
and Order of September 10,
1991 (Conlon, D.J.) 94-117

Memorandum Opinion and
Order of September 25,
1991 (Conlon, D.J.) 118-123

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RETIRED CHICAGO POLICE ASSOCATION, et al.,	)	
Plaintiff, v.	)	No. 90 C 0407
THE CITY OF CHICAGO, et al.,	)	Judge Suzanne B. Conlon
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Retired Chicago Police Association ("RCPA") filed this 42 U.S.C. 1983 class action against the City of Chicago ("the City"), three of its officers, and four pension funds. RCPA alleges that a settlement agreement stemming from earlier litigation between the city and the pension funds changed the terms of the city's Annuitant Healthcare Plan ("the plan") in a manner violative of the Fourteenth Amendment due process and equal protection rights of RCPA members. RCPA further contends that the changes in the plan violate contract clause principles. RCPA

seeks declaratory and injunctive relief preventing the implementation of the settlement agreement, which will significantly increase the cost of annuitant health care coverage under the plan. The city and pension funds move for summary judgment, contending that the prior state court proceedings resulting in the settlement agreement bar RCPA's present claims on res judicata grounds.

BACKGROUND

RCPA is an Illinois not-for-profit corporation organized for the sole purpose of protecting benefits of retired Chicago police officers and their spouses. RCPA 12(n) Statement of Undisputed Facts ("RCPA facts") 1. The four defendant annuity and benefit funds --the Policemen's Annuity and Benefit Fund ("police fund"), the Firemen's Annuity and Benefit Fund ("fir fund"), Municipal Employees', Officers' and Officials Annuity and Benefit Fund ("municipal fund") and the Laborers' and Retirement Board Employees' Annuity and Benefit Fund ("laborers' fund")

(collectively referred to as "the pension funds") -- were created and operate under authority of Articles 4, 5, 6 and 11 of the Illinois Pension Code, Ill. Rev. Stat. ch. 108 , to provide for an administer pension benefits of certain defined retired city employees. RCPA facts 5; Pension Funds' 12(m) Statement of Material Uncontested Facts (Funds' facts) 1. The boards of trustees of the respective pension funds are staffed with a combination of statutorily designated city officials, appointees of the mayor of the City of Chicago, a single annuitant member per board, and appointees selected by active employees participating in the pension funds. RCPA facts 6.

Beginning in 1964, the pension funds' annuitants were individually invited to voluntarily participate in the city's health care plan. RCPA facts 7; Funds' facts 2. Annuitants choosing to participate in tne plan were individually responsible for paying a monthly premium for health coverage. Funds'

facts 4. Since the mid-1970's, the city has administered its plan on a self-insured (employer pays claims directly rather than obtaining coverage from third party), claims-made (sufficient money appropriated annually for claims expected during each discrete budget year) basis. RCPA facts 7; Funds' facts 3.

In the late 1970's, the city began to partially subsidize annuitant health care coverage under the plan. RCPA facts 9; City's 12(m) Statement of Undisputed Material Facts ("City's facts") 2, 3. In April 1982, the city, as it had done periodically since 1964, increased the premium rates charged to annuitants. Funds' facts 4, 5; RCPA facts 10, 53. The new rates set the monthly premium at $55.00 for a single person and $21.00 for "medicare-eligible" participants. Funds' facts 5; RCPA facts 10.

Later that year, the State of Illinois enacted legislation to take effect in January 1983, specifically addressing health benefits

coverage for annuitants of the police and fire funds. Ill. Ann. Stat. ch. 108 , 5-167.5, 6-164.2 (Smith-Hurd 1987). The legislation directed the police and fire funds to contract with health insurance carriers to provide group health insurance for their respective annuitants. Id.; Funds' facts 6; RCPA facts 10, 47-48. The legislation also directed the police and fire funds to contribute $55.00 per month for non-Medicare qualified annuitants and $21.00 per month for Medicare qualified annuitants toward the payment of annuitants' monthly health insurance premiums. Id.; RCPA facts 47-48; Funds' facts 7; City's facts 1. The annuitants would themselves be responsible for any costs above the 55/21 levels, with the excess to be deducted from their monthly pension checks. Id.

Prior to this time, the pension funds had not subsidized any portion of their annuitant health care premiums. Funds' facts 6. The legislation also directed the city to levy a

special property tax to raise sufficient revenue to cover the funds' now mandatory monthly contributions. Id. Thus, at the time of implementation, the financial impact of the legislation upon the police and fire funds was zero, because the new mandatory subsidy would be paid entirely from revenue raised by the city itself. RCPA facts 61. The annuitants who previously had elected to participate in the city's plan found themselves in a similar financial situation. The new mandatory health care subsidies from the police and fire funds covered the entire monthly premium charged under the city plan.[15] Funds' facts 7; RCPA facts 59, 61.

[15]In 1985, similar legislation addressing healthcare coverage for annuitants of the Municipal and Laborers' Funds was enacted. See Ill. Ann. Stat. ch 108 , 11-160.1, 8-164.1 (Smith-Hurd 1987). However, this legislation required municipal and laborers' funds to subsidize only $25.00 of the cost of annuitant health care coverage, and it did not require these funds to contract for group health insurance. See id.; Funds' facts 8; RCPA facts 50.

The city's cost of providing health care coverage to the annuitants rose significantly in the ensuing years. City's facts 2. However, the annuitants' monthly premiums remained at the 1982 levels. RCPA facts 53, 60, 71; City's facts 2. This was due primarily to strong negative responses from the pension funds and annuitants to the city's attempts to institute premium increases in the mid-1980's. See RCPA facts 68-70. Consequently, the city has borne an ever-increasing share of total annuitant health care costs, as the 55/21 premiums cover a decreasing percentage of the total cost of annuitant healthcare coverage. City's facts 2; RCPA facts 59.

In October 1987, the city informed the pension funds that it would discontinue its subsidization of the difference between the cost to the city of providing health care coverage to the annuitants and the premiums paid by the annuitants. RCPA facts 74-82; Funds' facts 11. The city also filed suit in

the Circuit Court of Cook County against the pension funds, seeking to terminate annuitant health care coverage under its plan and to force the pension funds to reimburse approximately $58 million the city had expended on annuitant health care benefits through September 1987. RCPA facts 83; Funds' facts 11; City's facts 5; City of Chicago v. Korshak, Circuit Court of Cook County, Chancery Div. No. 87 CH 10134.

A number of annuitants moved to intervene to protect the interests of the individual annuitants who participated in the city health care plan. RCPA facts 84. The state court granted the motion to intervene on May 5, 1988, designating the intervenors as representatives for individual annuitants who had retired by December 31, 1987. Id.; City's facts 5; Funds' facts 12. In the meantime, the pension funds each moved to dismiss and filed counterclaims seeking to force the city to continue providing annuitant health care

coverage under the existing plan terms. RCPA facts 85; City's facts 5; Funds' facts 12.

On May 16, 1988, the state court dismissed the city's complaint, finding that the pension funds had no obligation to reimburse the city for its annuitant health care expenditures. RCPA facts 87; Funds' facts 15. The court then proceeded to conduct a bench trial on the pension funds' counterclaims. Id. However, the pension funds and the city reached a settlement of their dispute before the court issued its ruling on the counterclaims. RCPA facts 88; Funds' facts 15; City's facts 6.

Under the settlement agreement, the pension funds and the city agreed to promote legislation to change the Illinois Pension Code. Id. The pension funds and the city also agreed to enter an agreement consistent with the terms of the proposed legislation. Id. The Illinois legislature enacted the proposed changed on August 23, 1989. Pub. Act 86-273, 1989 Ill. Legis. Serv. 1884-85 (West)

(codified at Ill. Ann. Stat. ch. 108 , 5-167.5, 6-164.2, 8-164.1, 11-160.1 (Smith-Hurd Supp. 1991). The resulting amendments to the Illinois Pension Code require the city to continue to provide annuitant health care coverage through 1997. An independent actuary will estimate the aggregate cost of claims and premiums for each calendar year. The city will then set a new monthly premiums based on the determination of the actuary. Once the increased premiums take effect, the city will pay at least fifty percent of the cost of the health care claims. The pension funds will pay the city up to $65 each month for non-medicare annuitants and up to $35 each month for medicare annuitants from 1988 through 1992. From 1993 through 1997, the pension funds' monthly subsidy obligations will increase by $10 per month. In addition, the pension funds will pay health care benefits for widows and widowers of annuitants. Annuitants remain individually responsible for paying any costs remaining after the city and

pension funds have contributed their respective mandatory subsidies. Id.; RCPA facts 88; Funds' facts 15-18; City's facts 6.

While the new amendments to the Illinois Pension Code were working their way through the state legislature, the annuitant intervenors in the state court action objected to the settlement. RCPA facts 89. The intervenors also moved for summary judgment and a permanent injunction to prohibit the city from changing the terms of annuitant health care for existing participants. Id. The state court deferred ruling on the intervenors' motions until after it had passed on the fairness of the settlement agreement. Id.

After the passage of the new pension code legislation, the state court scheduled a fairness hearing for November 27, 1989. RCPA facts 90. Prior to the hearing, the court granted the intervenors' request to certify the case as a class action on behalf of all

persons claiming or receiving coverage under the city's health care plan through one of the pension funds as of December 31, 1987. Funds' facts 19. The state court denied a separately filed motion by RCPA for intervention and class certification. Funds' facts 13.

In advance of the hearing, the city mailed a court-approved notice of settlement to all members of the certified class, advising class members of the terms of the settlement and their right to appear at the fairness hearing. Funds' facts 19; RCPA facts 93. The state court limited the amount of oral testimony it would receive at the hearing. RCPA facts 91. However, the court did receive written objections, including the objections of numerous post-January 1, 1988 retirees who the intervenors had not sought to include in the certified class. Funds' facts 20. No annuitant testifying at the hearing spoke in favor of the settlement agreement. RCPA facts 90.

On December 12, 1989, the state court approved the settlement over the objections of the participating intervenor-class representatives. RCPA facts 91; Funds' facts 21. On December 15, 1989, the court issued an order implementing the settlement agreement; the intervenor-class representatives took an appeal. RCPA facts 92, 95; City's facts 8; Funds' facts 22. The Illinois appellate court stayed implementation of the settlement agreement pending the appeal. Id.

Meanwhile, RCPA filed this action on January 24, 1990, as the representative of the proposed class of annuitants who retired after January 1, 1988 and before August 23, 1989, and thus were not included as part of the intervenors' certified class in the Korshak proceedings. This court stayed proceedings in the present action until a final resolution of Korshak in the state appellate courts. Retired Chicago Police Ass'n v. City of Chicago, No. 90 C 0407 (N.D. Ill., Memo. Op.

and Order, June 4, 1990). On November 28, 1990, an Illinois appellate court affirmed the lower court's approval of the settlement as reasonable and in the best interests of all concerned parties. City of Chicago v. Korshak, 206 Ill. App. 3d 968, 565 N.E.2d 68 (1st Dist. 1990). The Illinois Supreme Court denied the intervenor-class representatives leave to appeal on June 5, 1991. The city and the pension funds now file motions for summary judgment contending solely that the Korshak settlement agreement precludes litigation of RCPA's claims now before this court on res judicata grounds.

DISCUSSION

Summary judgment must be granted when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Marcial v. Coronet Ins. Co., 880 F.2d 954, 959 (7th Cir. 1989). A party opposing a motion for summary judgment must set forth specific facts showing that there is

a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Schroeder v. Lufthansa German Airlines, 875 F.2d 613, 620 (7th Cir. 1989). All reasonable factual inferences must be viewed in favor of the non-moving party. Holland v. Jefferson Nat'l Life Ins. Co., 883 F.2d 1307, 1312 (7th Cir. 1989).

The city and pension funds base their motions for summary judgment exclusively on the argument that RCPA's cause of action is barred under the settlement agreement approved by the court in Korshak on res judicata grounds. Under the doctrine of res judicata, parties are barred:

> ...from litigating not only matters that in fact were raised and decided in an earlier suit involving the same cause of action and the same parties, but also all other matters that could have been raised in the earlier suit.

Hagee v. City of Evanston, 729 F.2d 510, 512 (7th Cir. 1984). In determining the preclusive effect of an Illinois court's judgment, federal courts must apply the res judicata law of Illinois. Id., citing Allen

v. McCurry, 449 U.S. 90 (1980); 28 U.S. C. 1738. The essential elements of Illinois res judicata law are "(1) an identity of parties or their privies; (2) an identity of causes of action in the earlier and in the later suit; and (3) a final judgment on the merits in the earlier suit." Welch v. Johnson, 907 F.2d 714, 720 (7th Cir. 1990), citing La Salle Nat'l Bank v. County of Du Page, 856 F.2d 925, 930-31 (7th Cir. 1988), cert. denied, 489 U.S. 1081 (1989). The motions for summary judgment of the city and pension funds founder on the first element of the Illinois res judicata standards.

The res judicata identity of parties requirement is based on

> 'a principle of general application in anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'

Martin v. Wilks, 490 U.S. 755, 761 (1989), quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940). The city and pension funds do not

contend that the members of the class of post-1988 annuitants represented by RCPA in the present action were either designated as parties or made parties by service of process in the Korshak proceedings. Indeed, the Korshak annuitant class quite plainly included only annuitants who had retired on or before December 31, 1987, while the proposed class in the present action is comprised solely of annuitants who retired from January 1, 1988 through August 23, 1989. The city and pension funds do contend, however, that the proposed class in the present action were in privity with the pension funds in Korshak and thus are bound by the terms of the settlement agreement.

The privity exception to the identify of parties requirement constitutes a recognition that "in certain limited circumstances, a person, although not a party, [may have] his interests adequately represented by someone with the same interest who is a party." Martin v. Wilks, 490 U.S. at 762 n.2, citing

Hansberry, 311 U.S. at 41-42; see also Montana v. United States, 440 U.S. 147, 154-55 (1979). It is true that under Illinois law, trustees may be regarded as being in privity with their beneficiaries. See Angevine v. City of Sesser, 39 F. Supp. 498, 500-01 (D. Ill. 1941) (applying Illinois law); While v. MacQueen, 360 Ill. 236, 243-44, 195 N.E. 832, 835 (1935); Anderson v. Elliott, 1 Ill. App. 2d 448, 117 N.E.2d 876 (1st Dist. 1954). Thus, a judgment binding a trustee may bind the trust beneficiaries. Id. However, in a res judicata context, the court should not merely assume an identity of interest between a trustee and a beneficiary.

The pension funds assert that they filed the Korshak counterclaims in an effort to protect the interests of their members. The concern of the pension funds' trustees for the interests of their annuitant beneficiaries need not be questioned. However, it is proper to note that the counterclaims were filed in

the context of an action by the city that alleged, in essence, a breach of duty by the trustees for having failed to pay for the health care benefits of the annuitants. The city's allegations in Korshak, therefore, created a potential conflict of interest between the pension funds' trustees and their annuitant beneficiaries. Of course, the state court dismissed the claims of the city, thus removing a source of possible conflict between the pension funds and their annuitants. However, a potential conflict persisted in the context of the settlement negotiations between the city and the pension funds due to the fact that the pension funds were negotiating, in part, to limit the extend of their own subsidization of annuitant health care premiums.

The state trial court apparently recognized this potential divergence of interests between the pension funds and the annuitants, first in granting intervenor status to individual annuitants, and later in

certifying as a class all individual annuitants who had retired by the end of 1987. The grant of intervention and class certification to the individual annuitants utterly undermines the city and pension funds' suggestion that the pension funds represented the individual annuitants in Korshak. Moreover, were the pension funds truly free of conflict with regard to the interests of their annuitant beneficiaries, the intervention and class certification would have been entirely unnecessary. The similarity of interests of the pre-1987 class in Korshak and the proposed class in the present case leaves little question that the pension funds were not in privity with the proposed class in this case.

Even assuming the pension funds were free of any conflict regarding the interests of the certified class of annuitants in Korshak, there is some question whether the pension funds possessed the authority to negotiate and settle the claims of the annuitants. The pension funds and the RCPA appear to dispute

whether annuitant participation in the city health care plan after the implementation of the 1983 changes in the Illinois Pension Code was group-based, or individually based. In the present posture of this case, this dispute presented a genuine issue of material fact.

The 1983 pension code legislation directed the police fund, for example, to contract with health insurance carriers for the provision of group health insurance for all annuitants. Ill. Ann. Stat. ch. 108 , 5-167.5(b) (Smith-Hurd 1987). The parties appear to dispute whether the police fund actually contracted with the city for group-based coverage as required by the statute. If the police fund did contract with the city for group coverage, the police fund would likely have possessed the authority to negotiate and settle the claims of its annuitants arising out of that contract. On the other hand, if the police fund did not contract with the city, the annuitants' post-1983 participation in the plan would have continued solely on a

voluntary individual basis. The implication of individualized participation is that the police fund would not have had any authority to settle the claims of its beneficiaries in Korshak, because those claims would arise only under direct contracts between the individual annuitants and the city, rather than derivatively through any city-police fund contract. See Ill. Ann. Stat. ch 17, 1665 (Smith-Hurd 1987) (trustee's authority to compromise claims extends merely to claims for or against trust estate); cf. Scott v. Perona, Perona & Tonozzi, 115 Ill. App. 3d 76, 450 N.E.2d 24 (3d Dist. 1983) (testamentary trustees lack power to settle beneficiaries' non-trust claims).

The city and pension funds thus have failed to establish privity between the pension funds and the members of the proposed class in the present action. The city alternatively contends that the certified class of pre-1987 annuitants in Korshak sufficiently represented the interests of the

post-1988 annuitant class members in the present action to warrant application of the res judicata doctrine. Even conceding a close identity of interests between the two classes, the city's position suffers from at least one significant flaw.

It is axiomatic that a court's approval of a settlement agreement between some of the parties to a dispute "'cannot dispose of the valid claims of nonconsenting intervenors.'" Martin v. Wilks, 490 U.S. at 768, quoting Local Number 93, International Association of Firefighters v. Cleveland, 478 U.S 501, 529 (1986). The intervening certified class of pre-1987 annuitants in Korshak did not agree to the terms of the settlement agreement. Thus, the binding effect of the Korshak settlement agreement on the pre-1987 annuitants is questionable, at best. Under these circumstances, the settlement agreement certainly cannot be said to have a binding, res judicata effect on the post-1988

annuitants who, unlike the pre-1987 annuitants, were not even parties to Korshak.

The city and pension funds have failed to establish an identity of parties or privities sufficient to support the res judicata effect of Korshak on the present dispute. No purpose, therefore, would be served in analyzing the motions of the city and pension fund under the remaining two components of the Illinois res judicata standard.

CONCLUSION

The motions of the city and pension funds for summary judgment on res judicata grounds are denied.

ENTER:

/S/Suzanne B. Conlon
United States District Judge

September 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RETIRED CHICAGO POLICE ASSOCATION, et al.,	)	
Plaintiff,	)	
v.	)	No. 90 C 0407
THE CITY OF CHICAGO, et al.,	)	Judge Suzanne B. Conlon
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The City of Chicago ("the City") has filed a motion to reconsider denial of its motion for summary judgment. See Retired Chicago Police Ass'n v. City of Chicago, 90 C 0407 (N.D. Ill. Mem. Op. and Order, September 10, 1991). The city premised its motion for summary judgment on the res judicata effect of a settlement agreement in the case Korshak v. City of Chicago, Circuit Court of Cook County, Chancery Div. No. 87 CH 10134, aff'd, 206 Ill. App. 3d 968, 565 N.E.2d 68 (1st Dist. 1990). The city's motion for summary judgment was denied on the grounds that Retired Chicago

Police Association ("RCPA") was not in privity with the parties in Korshak, thus Korshak is not res judicata of RCPA's present cause of action. The city now attempts to rebut certain conclusions of the court in finding a lack of privity.

I. Conflict of Interest Between Fund Trustees and Beneficiaries

The city first contends that, contrary to the conclusion stated in the September 10, 1991 order, no conflict of interest existed between the interests of the pension fund trustees and the annuitant beneficiaries in Korshak. One of the based for the court's conflict of interest conclusion was the fact that the Korshak trial court granted intervenor status to certain individual annuitants because annuitant interests would not be adequately represented by the pension funds in defending against the city's claims. The city contends that the Korshak grant of intervenor status does not necessarily amount

to a finding of conflict of interest between the pension funds and the annuitants.

The Korshak annuitants' motion to intervene stated that "[b]ecause [the city's] suit alleges that the Trustees of the Pension Funds breached their statutory duties, the interests of the petitioners, and of all other participants in the Pension Funds, are not and cannot be adequately represented the Trustees or their counsel." City's 12(m) Statement of Material Uncontested Facts, Exh. G at 3. The Korshak trial court's reason for granting the motion to intervene is unknown because the motion was granted summarily. It is conceivable that the trial court granted the motion to intervene on some basis other than a conflict of interest between the pension funds and the annuitants. However, the question of the import of the Korshak court's granting of the motion to intervene arose in the context of the city's motion for summary judgment in the present case.

II. Korshak Intervenors Raised Same Claims as RCPA in Present Action

The city contends that the Korshak intervenors raised the same claims as those raised by the RCPA in the present action. Whether this contention is correct or not is irrelevant. First, any claims raised by the intervenors were not finally resolved by the trial court. By the city's own admission, the settlement agreement left all legal claims and factual issues intact. The parties are free to raise these issues after the settlement agreement expires on December 31, 1997. Second, the Korshak intervenors did not agreed to the settlement. It is axiomatic that a court's approval of a settlement agreement between some of the parties to a dispute "'cannot dispose of the valid claims of nonconsenting intervenors.'" Martin v. Wilks, 490 U.S. 755, 768, quoting Local Number 93, International Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 529 (1986). Consequently, even if the Korshak intervenors

did raise the same claims as those now raised by RCPA, the settlement agreement cannot dispose of the Korshak intervenors' claims as res judicata of the present RCPA claims, because the Korshak intervenors did not agree to the settlement.

III. Group v. Individually-Based Plan Participation after 1983

The city asserts that in denying the city's motion for summary judgment, the court incorrectly concluded that a genuine issue of material fact exists as to whether annuitant participation in the city's health care plan was group based or individually based after 1983. The court directs the city's attention to its own complaint in Korshak, stating:

> Upon information and belief, from January 1983 to the present, neither the Policemen's Board nor the Firemen's Board has contracted with an insurance carrier to provide group health insurance for annuitants.

City's 12(m) Statement of Material Uncontested Facts Exh. C, 10 (City's Korshak Complaint 10).

The city's motion to reconsider is denied.

ENTER:

/S/Suzanne B. Conlon
United States District Judge

September 25, 1991

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Appendix G 124-151

Report of Proceedings of May 5, 1988 124-151

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

CITY OF CHICAGO	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 87 CH 10134
	)	
MARSHALL KORSHAK, et al.	)	
	)	
Defendant.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable ALBERT GREEN, Judge of said court, on Thursday, the 5th day of May, 1988, at the hour of approximately 10:00 o'clock A.M.

PRESENT:

MS. AMY BECKETT,
Appeared on behalf of the Plaintiff;
MR. CLINTON KRISLOV,
Appeared on behalf of Ryan Petitioners;
MR. SIDNEY KARASIK,
Appeared on behalf of other Petitioners;
MR. KEVIN FORD,
Appeared on behalf of Policemen's Annuity and Benefit Fund;
MR. MARTIN BURNS,
Appeared on behalf of Firemen's Annuities and Benefit Fund;
MR. FRED HEISS,

Appeared on behalf of Municipal and Labors.

Stephanie J. Bush
Official Court Reporter
Circuit Court of Cook County.
County Department - Chancery Division.

THE COURT: City of Chicago versus Marshall Korshak, 87 Ch 10134. Marshall Korshak, 87 CH 10134. Matter is on for status. Would the respective attorneys approach the bench and identify yourselves?

MR. KRISLOV: Clinton Krislov, on behalf of Ryan Petitioners.

MR. KARASIK: Sidney Karasik for other petitioners.

MR. FORD: Kevin Ford, F-o-r-d, on, behalf of the Policemen's Annuity and Benefit Fund.

MS. BECKETT: Amy Beckett on behalf of the City of Chicago.

MR. BURNS: Martin Burns, B-u-r-n-s, on behalf of Firemen's Annuities Benefit Fund.

MR. HEISS: Fred Heiss, Municipal and Labors.

THE COURT: Pray tell, who would give me some kind of status report?

MR. FORD: Well, we have a--

THE COURT: Mr. Ford.

MR. FORD: We have a number of open items, your Honor, including the intervention petitions, pending motions to dismiss, and most immediate concern to my client and the other funds is our counterclaim and our prayer for injunctive relief.

We are continuing to met with the City in an attempt to resolve this matter. We have approximately 26 days to resolve it. I think the chances, this is only my observations as an attorney, and a participant at the negotiations, but I think I would be -- Realistically, I'd have to say the chances of us resolving it are slight. And we have no alternative, your Honor, but to ask that you commence as soon as possible the hearings for our motion for preliminary injunction.

THE COURT: As I understand it, there are motions to strike the counterclaim that prays

for this injunctive relief and that would take priority.

MR. FORD: That's right, your Honor. You would have to resolve the motion to dismiss first. And we could hear it. There is also motions to dismiss the complaint. There is some of the same law discussed, so there may be some judicial economy in hearing both motions at the same time.

THE COURT: Are you addressing the motion to strike and dismiss that has been filed by the various pension funds as against the City's complaint?

MS. BECKETT: Also in the interest of judicial economy, your Honor, the City had filed and has filed a brief in support of the motion for summary judgment on our mandamus claim. Should you deny the motion to dismiss the mandamus claim, we would submit that as a matter of law, resolution of our mandamus claim may moot out some of the counterclaims, because of the City's view that state statute imposes upon the pension funds and not the

City, the responsibility to provide for health care for annuitants, at least with respect to policemen and firemen annuity funds.

One other comment, before -- if the funds prevail on this -- Well, if the City loses on its motion to dismiss the counterclaims, or if your Honor proceeds with any of the counterclaims, I would suggest, it would seem appropriate to schedule this for pretrial before going all the way through a trial. Perhaps with the assistance of your Honor, we might be able to make more progress towards settling than the parties have on their own.

I understand that in the past you have certainly been willing to entertain pretrials in chambers. I think this may be a case--

THE COURT: Are you suggesting we do this before we hear any motions to strike and dismiss?

MS. BECKETT: Only as an alternative suggestion, in the event the City does not

prevail on its motion to strike and dismiss the counterclaims. And your Honor feels-- your Honor's rulings that they may proceed to trial on some kind of preliminary hearing, I would suggest that time would be appropriate to set for pretrial, and which time we may make progress on resolving the matter.

MR. HEISS: If the Court please, on behalf of Municipal and Labors. She's indicated on basis of judicial economy, but the motion for summary judgment, the Municipal and Labors could not properly answer that motion without the completion of the discovery that is in force right now that we were in here on Monday on their motion. So I would not suspect that the motion for summary judgment, would be set at the same time the motion to strike. As Kevin Ford indicated, the motion is on behalf of Municipal and Labors. The motion as to their complaint for mandamus and on the motion, the preliminary injunction, that can be heard at the same

time, to strike those pleadings on behalf of Municipals.

THE COURT: You have anything, Mr. Burns?

MR. BURNS: I would only add, your Honor, I do not agree with Miss Beckett's analysis of the legal issue with respect to the disposition of the mandamus action. Seems to me there is nothing that makes the situation either or.

I mean the City may well have an obligation. The pension funds may well have an obligation. They are not mutually exclusive. In the countercomplaint we are acting more on behalf of our annuitants rather than on behalf of the funds themselves. Because the funds are not involved in the health care issue directly, but only because our annuitants are. And I submit the City may well have obligations to those annuitants even though the funds may have some insurance obligation to do something under a state statute.

I am not certain it makes a great deal of difference at this time, but I would just point out their resolution of the case as Miss Beckett's stated on that issue, if it with to be granted, would not necessarily relieve this Court of the obligation to go ahead with the countercomplaints, in my opinion.

THE COURT: All right. As I understand, the motion to strike and dismiss the counterclaim has been fully briefed and I have all of the pleadings here. I will make sure I have got them.

There is a motion to strike and dismiss the original complaint filed by the City. All parties have responded to that; is that correct?

MR. FORD: That's correct.

THE COURT: What I will do is seek out some time as quickly, at all possible and set you down for hearing. And I will have, because of the urgency of this matter, I will preempt other matters.

Now, as to the summary judgment. I am not going to address-- I am not going to set the hearing on summary judgment as yet. I can do that, int he event I have to, I can set that shortly thereafter and give some of the other people an opportunity to file quick responses. So you don't have to worry about summary judgment. It will not be heard on that date.

MR. HEISS: Could the orders read that we have got a specific date to respond? Could the record read that it be continued generally to file responses, where we can address that the next time we come to court? A response is due on the 13th of this month to the motion for summary judgment. And we are trying to set two depositions of people I feel will be necessary to--

MS. BECKETT: I have to object to that, your Honor. The depositions were noticed not with respect to their response to our summary judgment motion, but in an attempt to gather facts they deem necessary for preliminary

injunction hearing, that they should go forward. In the event you need to rule on summary judgment motion you will have the briefs. This will aid in having the briefs before you, and I have to object to any general continuance.

THE COURT: I will not continue it generally; but I will give him an extension of one week past the date for motions to strike and dismiss.

THE COURT: All right. Now before I start seeking out a date, there is still one other matter pending before me. And that's petitions to intervene.

MR. KRISLOV: Your Honor, if I may speak to that.

THE COURT: Counsel.

MR. KRISLOV: It is, I suppose, I want -- for whatever reason, we did, we acceded to your wishes. We laid low and kept our mouths shut. We did ask from time to time to be kept abreast of the matters and we were very clearly informed that it was none of our

business. And the fact we were not going to be kept abreast, we were not kept abreast. I asked when depositions were being taken. I was not told when they would be taken. I was clearly told we wouldn't be allowed in. I discovered yesterday, day before yesterday that depositions were being noticed up by Mr. Ford's firm, and did not, was not apprised of them until after it had taken place.

We sat through all this in the hopes that the parties could reach a resolution. But what they have been doing is bettering their position, vis-a-vis each other, in the litigation trying to keep us out.

At this point, we have sat for six months outside the case. We believe that we are clearly entitled to intervene here. And it serves no purpose to keep us out. In fact, we would suggest perhaps our addition to the case might help bring the parties to settlement. I can't guarantee it, your Honor, but it is our belief that that would be the result.

We do think -- we are at the point where we have more lawyers in, I will concede, than we have motions. But I don't now about all the motions. We would suggest that very aggressive administration by the Court may prevent multiplicity. We have eight lawyers here representing four funds. We have one fund with one firm filing double pleadings for each issue. We have other lawyers appearing on television. We have all sorts of things going on.

We would ask your Honor, that we finally be permitted to intervene as we are entitled to. And that one -- and certainly one of the case management issues would be, we would suggest, narrowing the representation by the funds so that the four funds whichever the virtually identical positions would speak with a limited number of voices rather than eight. There is no reason for everything to be multiplied so far out of whack that the Court has this pile to deal with all on one issue.

THE COURT: When you say this pile, are you referring to the 14 inches of pleadings to my left?

MR. KRISLOV: Yes, your Honor.

THE COURT: Would you like to add this on, the petition to intervene? That's another inch and a half.

MR. KRISLOV: Your Honor, I guess I would respectfully say we only added an inch and a half.

THE COURT: Mr. Karasik, what do you have to add to this?

MR. KARASIK: Your Honor, very little. I recognize that until intervention is allowed, we really don't have any standing to the other proceedings.

THE COURT: What I am doing right now is giving you a hearing on your petition to intervene. You have anything to add to your briefs?

MR. KARASIK: Nothing. And last time I joined in the petition or motion of the other intervenors.

THE COURT: Do the objectors to the intervention have anything to add to their briefs?

MR. FORD: Your Honor, the Police Benefit Fund, Police Annuity and Benefit Fund, assuming that the representations by, on behalf of the intervenors is that they represent members of our funds, beneficiaries of our funds. And their representation that they do not purport to represent the funds, but only these individuals, although the individuals are not parties to the litigation, we don't have any problem with their intervention. And I speak only for the Police Annuity Funds on this issue.

THE COURT: I understand that.

MR. BURNS: I would only say this. I informed Mr. Krislov some tie ago if he wanted to intervene without a request for fees to be paid by my client, that my position would be different. I told him I saw no reason why he should represent the Firemen's Pension Fund, because if I agreed with that, that's an

admission of my inadequacy in representing that client.

Now Mr. Krislov comes in today, talks about eight lawyers representing four funds. I don't know what he's talking about. I represent the Firemen's Fund and Mr. Ford represents the Policemen's Fund. We have more than one lawyer in an office, but that doesn't result in any duplication of efforts. And I submit that -- otherwise I would just rely on the materials submitted, covered in our brief. Because Mr. Krislov may say he has a right to do it, but the Code of Civil Procedure sets forth the bases for intervention. And I submit that he has no legal right to do it.

Mr. Karasik and Miss Beckett are asking to intervene under a different section of the Code and I have no objection to their intervention because they are not requesting fees.

MR. KARASIK: Yet. Let that go, Judge.

THE COURT: Go ahead, please.

MR. HEISS: Your Honor, on behalf of Municipal and Labors' end. Mr. Krislov obviously hasn't been reading the statute for the last five months. There is many differences, there is significant differences in the obligations on the part of the parties. And for Mr. Krislov to come in and indicate he's going to put this thing together and settle the whole matter especially, there could be conflicts between the funds. And I join in with Mr. Burns on the course there is no necessity for him to appear on behalf of Municipal and Labors, and that question of fees.

There is different annuitants' rights between the four funds. And it is, to any lawyer who reads those statutes, would become apparent. So, I -- as to the Court's, as to the Municipal and Labors as the intervention on behalf of the annuitants, if he hasn't seen conflict with those for Police and Fire, but obviously he should not be

intervening in part of the litigation as to the trustees of the Municipal and Labors.

THE COURT: Miss Beckett, do you have anything to add?

MS. BECKETT: Yes, three points. First of all, the City joins in objecting to any awards of fees or quote, unquote appointment of counsel requested by Mr. Krislov.

Secondly, we reiterate our objection to duplicate representation on behalf of the proposed intervening classes. We had no objection to bringing in the annuitants. As a matter of fact, it is to our advantage and certainly assists in our claim for restitution of back amounts of pay; but which should not have to duplicate our efforts in responding to essentially the same argument brought on behalf of essentially the same classes of clients represented by Mr. Karasik and Mr. Krislov.

Finally, we object-- I will withdraw that. I was going to reobject to the petition for class certification, but that's not before

the Court at this time and I will reserve any comments.

THE COURT: Mr. Krislov, I will give you an opportunity to reply.

MR. KRISLOV: Your Honor, there are only about three or four points I'd like to reply to quickly.

Quickly, Mr. Burns suggests that this motion suggests that he or his firm is inadequate in some way. I have no fight with Mr. Burns. I have no fight with his firm. However, his client, the trustees may have a conflict in terms of if there is a repayment down the road as to whether that comes from the funds, which they assert or it would have to come from trustees. That's a clear conflict. That's why there is inadequacy of clear representation. It is not because Mr. Burns is not an adequate lawyer. That's no issue here.

Number two, as far as multiple fees or duplicitous, redundants, whatever, there will be none. May be assure the Court tha

Mr. Karasik, who is certainly more experienced at this type of litigation than I am, the two of us have talked about that. And certainly if a fee petition is submitted down the road, that's within your Honor's control.

THE COURT: I am well aware of discretion I possess, discretionary powers I possess.

MR. KRISLOV: And I am certain that you will. If we put through any duplication, I am sure you will delete those. And you will define who any fees come from.

Finally, as to the basic question which is who is Krislov and what right he has to come in here, which, I suppose, is what it all boils down to.

I believe in the Ryan case we earned our spurs and we represent the participants of all four of the funds. So that those participants would all be present here.

I suppose, finally, Mr. Heiss has a point. There are certain slight differences, slight or major, between some of the language at issue here between some of the various

funds. With respect to two of the funds, they are virtually identical. With respect to two others, they are virtually different. But I am not demanding that there absolutely only be one. But there certainly is a basis for narrowing down that representation so that we don't have to have eight lawyers here on behalf of the trustees' interest every time we have a minor appearance.

THE COURT: Before this Court appears two petitions filed by groups of annuitants seeking intervention in the instant case.

City of Chicago filed this suit to require certain named defendants to provide group health insurance for annuitants of the Police and Firemen's Annuity and Benefit funds. The City claims that the defendants have a statutory obligation to provide insurance to retired policemen, firemen and other annuitants.

Certain members of the board, of the Firemen's Annuity and Benefit Fund filed a countercomplaint seeking an order enjoining

the City from terminating these medical care benefits.

Certain members of the Laborers and Retirement Board Employees filed a countercomplaint. These counterplaintiffs also seek an order enjoining the City from terminating these benefits.

Before this Court are two petitions to intervene filed by groups of annuitants. In the Ryan petition, the petitioners point out the complaint seeks restitution from the pension funds. The petitioners, annuitants will allegedly be harmed if such restitution is ordered. These petitioners also maintain that the City has charged the trustees of the funds with breach of certain statutory duties. Therefore, the interest of the participants in the fund cannot be adequately represented by the trustees.

In the Ryan response, the annuitants claim that the trustees have an incentive to shift restitutionary obligations onto the

pension funds or to the petitioning class members.

The Boards do not object to the timeliness of the annuitants' petition. They only argue they will adequately represent the interest of the annuitants.

Illinois Revised Statutes 1982, Chapter 110, Section 2-408(b) provides, "Upon timely application anyone may, in the discretion of the Court, be permitted to intervene in an action; one, when a statute confers a conditional right to intervene; or two, when an applicant's claim or defense in the main action have a question of law or fact in common."

"Permission to intervene can be granted in the discretion of the trial court when a statute confers a conditional right to intervene, or the intervenor has a claim or defense in common with a question of law or fact in the main action." And I cite Mississippi Bluff Motel, Inc. versus Rock Island County, 96 Ill. App. 3d 31.

"Intervention should be denied if the intervenor possesses another adequate remedy. However, it should be allowed if the intervenor does not possess another adequate remedy." Citing Hammond versus Cape Industries, 9 Ill. App. 3d 899.

In the City of Chicago versus John Hancock Mutual Life Insurance Company, 127 Ill. App. 3d 140. The Appellate Court was presented with a situation not unlike the one, the case at bar.

The City filed suit against the owner and operator of John Hancock Center, charging them with building code violations. Joan Whitmer, the owner of a condominium, sought leave to intervene in the housing court case. The trial court denied the petition, citing that Witmer's rights would be adequately represented by the City and condominium association.

On appeal, Whitmer argued that the City's representation is inadequate because its interest is in the public health and not

Whitmer's health. And further argued the condominium association could not adequately represent her interest because it denied the existence of the building code violations, citing Adams versus County of Cook, 83 Ill. App. 3d 68. The Appellate Court noted that if an applicant for intervention presents a unique interest, the presumption or inference is that the existing parties do not adequately represent such interest.

The Court further noted when the interest of the application and existing parties are similar in some respects and different in others, the Court should ask whether a reasonable person in the applicant's position would rely on the existing party for representation. Finding the representation of Whitmer's interest would or may be inadequate, the Court reversed the trial court's ruling.

Here the trustees have presented counterclaims, which so far, appear to represent the interest of the annuitants. The annuitants' claim, however, that the board

members have an interest or incentive to shift restitutionary obligations upon them. Therefore, while representation by the board members so far appears to parallel the interest of the annuitants, a possibility exists that interest of the two will become divergent. Therefore, this Court will grant the petitions to intervention.

And I assure you, counsel, I will remember your remarks about fees. Prepare the appropriate orders on that phase of it.

MR. KRISLOV: Thank you, your Honor.

THE COURT: Now, I have to address something that I was hoping I would never have to address. And that's the setting of the respective motions to strike and dismiss. Its been fully briefed. This is the 5th. I have an '84 case set for Monday, May 16. I will take -- I am going to need four or five days to review all this.

I am going to reschedule Laird versus Ellison and incur the wrath of the respective attorneys on that case. It is an

'84 case. I am willing to set you down for argument on both motions at 2:00 o'clock on Monday, May 16.

After disposing of those motions, whatever else remains we will address possibilities of setting the motions for summary judgments or whatever else might come up or, hopefully, you people may come to me and say Judge, it is not necessary to hold the hearings, et cetera.

Prepare the appropriate orders.

MR. KRISLOV: Your Honor, may we have -- I don't want to have to put in the orders--may we have the assurance from the other counsel we will be no brought up--now we will be on the service list. Can we be brought up on all the pleadings that have not been served on us to date?

MS. BECKETT: (Nods head.)

THE COURT: Let the record reflect Miss Beckett nodded her head in affirmation.

MS. BECKETT: I speak only for City of Chicago in answering that request.

THE COURT: And hearing no objection from the others, they will probably do the same. They will do the same.

MR. KRISLOV: Thank you.

THE COURT: Prepare the orders.

MR. KRISLOV: I assume that covers discovery too?

MR. BURNS: I don't know what you mean, covers discovery.

MS. BECKETT: Depositions that have been taken, like--

MR. HEISS: For the record, he's of record. I think it is--he will get whatever he--

THE COURT: I caution you all, please conserve o costs and expenses. That's all I am going to tell you at this juncture.

MR. KRISLOV: Than you your Honor.

MR. BURNS: Thank you, Judge.

(Which were all the proceedings had in the above-entitled cause this date.)

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

I, Stephanie J. Bush, an Official Court Reporter for the Circuit Court of Cook County, County Department - Chancery Division, do hereby certify that I reported in shorthand the proceedings had at the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed into typewriting, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable ALBERT GREEN, Judge of said court.

/S/Stephanie J. Bush
Official Court Reporter

Dated this 24th day
of MAY, 1988.

(2)

No. 91-873

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARTIN RYAN, BERNARD MCKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH and KATHERINE DOYLE, Class Representatives of the December 31, 1987 participants in the City's Annuitant Healthcare Program,

Petitioners,

v.

CITY OF CHICAGO, a Municipal Corporation, and MARSHALL KORSHAK, RUSSELL EWERT, ODELL HICKS, THOMAS D. ALLISON, FRED W. SETTLES, CECIL A. PARTEE, CHESTER JASKOLKA, RONALD R. NORRIS and

[Respondents Continued on Inside Cover]

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

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Respondents.

QUESTION PRESENTED

Whether a state-law rule of privity that binds pension fund beneficiaries to a court-approved settlement between the fund trustees and the City violates the Constitution.

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OCTOBER TERM, 1991

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

---

BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

OPINIONS BELOW

The opinion of the Illinois Appellate Court is reported at 206 Ill. App. 3d 968, 565 N.E. 2d 68 (1990), and is reprinted at Pet. App. 48-64.

The opinion and order of the Circuit Court of Cook County, Illinois, have not been reported. They are reprinted at Pet. App. 1-47.

STATEMENT

This case arises from litigation between the City of Chicago and its four employee pension funds over the amount of money the City contributes to the health care costs of retirees who participate in those funds. The case originally involved only the City and the pension funds, and concerned their dispute over the extent to which the City was obligated to contribute to pensioners' health care costs in excess of the contributions specified in pertinent Illinois statutes. C. 2, 24.[1] Petitioners in this Court are the representatives of a class of intervening beneficiaries of the funds who objected to the settlement between the City and the funds, by which the parties sought and obtained legislation requiring the City to bear at least 50% of the cost of retirees' health care. C. 12, 251-57, 341-54, 1518. The trial court held a fairness hearing, concluded that the settlement was fair, and approved it over the objections of petitioners. Tr. of Nov. 22, 1989; C. 3481.

The Illinois Appellate Court affirmed, concluding that the settlement was fair and that the trial court had properly approved it over the objections of the inter-

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[1] "C." is the designation for the common law record of this case.

venors. *See City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 565 N.E. 2d 68 (1990) (Pet. App. 48-64). That court subsequently denied petitioners' petition for rehearing as well as a motion for a stay of the mandate. The Supreme Court of Illinois then denied petitioners' petition for leave to appeal.

Petitioners now seek review of the decision of the Illinois Appellate Court permitting the City of Chicago to implement the settlement agreement.[2] Justice Stevens and Justice Blackmun both denied petitioners' applications for stay pending disposition of the petition for certiorari, permitting the settlement to be implemented as of January 1, 1992.

ARGUMENT

THE RULE THAT TRUST BENEFICIARIES ARE BOUND BY THEIR TRUSTEES' DECISION TO SETTLE A CASE INVOLVING TRUST ASSETS ONCE THAT SETTLEMENT IS FOUND TO BE FAIR BY A COURT OF COMPETENT JURISDICTION DOES NOT OFFEND THE CONSTITUTION.

This Court's jurisdiction over judgments of state courts is, of course, limited to questions of federal law. See 28 U.S.C. § 1257. Even a cursory perusal of the opinion of the Illinois Appellate Court in this case (Pet. App. 48-64) makes clear that that court decided no question of federal law. The court held only that the trial court had appropriately found the settlement to be fair, and approved it over the objection of petitioners. That is solely a question of state law. Although petitioners claim that the settlement cannot constitutionally be approved over their objection, that question is neither preserved for this Court's review nor of any particular importance or difficulty. The petition should therefore be denied.

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[2] The petition is incorrectly styled as directed to the Supreme Court of Illinois. That court declined to review the decision of the appellate court.

1. As a threshold matter, the question whether, as a matter of federal law, the circuit court's judgment in this case can appropriately bind intervenors is not preserved for this Court's review. In the trial court, petitioners never objected to the circuit court's ruling that it would enter judgment if it concluded after a fairness hearing that the settlement was fair. In fact, petitioners, along with the other parties, informed the trial court that they had agreed that the court need not decide the merits of the original claims in the case, and instead need only hold a fairness hearing that would conclude the litigation if the court approved the settlement. See C. 1518; Tr. of Sept. 29, 1989, at 4-8. It is settled law in Illinois that a litigant may not assert as error on appeal a procedure to which it not only failed to object in the trial court, but to which it in fact agreed. See, *e.g.*, *People ex rel. Hartigan v. Illinois Commerce Commission*, 117 Ill. 2d 120, 131, 510 N.E. 2d 865, 869 (1987); *E & E Hauling, Inc. v. Pollution Control Board*, 107 Ill. 2d 33, 38, 481 N.E. 2d 664, 666 (1985). Because petitioners failed to raise in the trial court any federal constitutional objection to being bound by their trustees' settlement, the appellate court did not reach this claim. As noted, the appellate court held only that notwithstanding petitioners' complaints, the settlement was fair. This decision thus stands on an adequate and independent state-law ground, and there is no basis for the exercise of this Court's jurisdiction. See *Michigan v. Long*, 463 U.S. 1032, 1038-41 (1983). See also *Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989).

2. While petitioners claim that a settlement cannot be approved over the objection of an intervening party, petitioners do not address cases in which, as here, the original party is in privity with the intervenor, and the objecting class is certified only for purposes of testing the fairness of the proposed settlement. Petitioners do not even attempt to construct an argument that the Due Process Clause (or any other provision of the Constitution) pro-

hibits binding a trust beneficiary to a judgment concerning trust assets to which his trustee has consented, and after a court has independently scrutinized that judgment for fairness. The idea that trust beneficiaries are bound by the actions of their trustees within the scope of their reasonable business judgment is well established in Illinois law. See, *e.g.*, *Childs v. National Bank of Austin*, 658 F.2d 487, 494 (7th Cir. 1981) (applying Illinois law); *In re Moir Hotel Co.*, 186 F.2d 377, 381-82 (7th Cir. 1951) (same); *Continental Illinois National Bank & Trust Co. v. Sever*, 393 Ill. 81, 93, 65 N.E. 2d 385, 391 (1946). The petition does not forward any argument why this rule offends due process, nor does it cite any authority for that proposition. Indeed, the Illinois rule of privity is consistent with the generally accepted common law rule that trust beneficiaries are in privity with their trustees and bound by the decision of their trustees to settle litigation. See Restatement (Second) of Trusts §§ 187, 192 (1959).

3. It would be surprising, to say the least, if the well-settled rule of privity followed in Illinois offends due process. The only authorities petitioners cite construe the intervention provisions in federal law, and do not consider the matter as a question of due process; moreover, those cases involve parties with differing interests, and not privies. See, *e.g.*, *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).[3] Because trustees are charged with fiduciary responsibilities, it is reasonable to bind beneficiaries to their trustees' decisions to settle, especially when, as here, the beneficiaries are afforded the extra protection of in-

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[3] Petitioners' reliance on the *Firefighters* case is particularly curious, given the Court's square holding there that intervenors cannot veto a settlement: "While an intervenor is entitled to present evidence and have its objections heard at hearings on whether to approve a consent decree, it does not have the power to block the decree merely by withholding its consent." 478 U.S. at 529.

dependent judicial scrutiny regarding the fairness of the settlement. An objection by a small number of the total group of beneficiaries does not require rejection of the trustees' decision to settle, as both the trial and appellate courts in this case held.

4. Petitioners also contend that the decision here impaired their rights under the Contracts Clause, U.S. Const. Art. I, § 10, cl. 1. Once it is apparent, however, that this judgment was entered only as the result of the trustees' decision to settle and that their beneficiaries were appropriately bound under state-law privity rules, the asserted "impairment" of contractual rights proves illusory. No rule of Illinois law prevented the assertion of whatever contractual rights petioners or their trustees may have had. All that happened in this case was that the trustees, unsure what the outcome of the case would be if pressed to its conclusion, made a reasonable decision to settle. No state-law rule or governmental actor "impaired" any contractual rights; instead, the trustees voluntarily and reasonably compromised those claims. A trustee's reasonable decision to settle a contractual claim when faced with the risks of litigation works no impairment of contract. Petitioners cite no authority to the contrary, and acceptance of their position would mean that it would become not only impractical but in fact unconstitutional for trustees ever to settle contractually based claims of a trust if even a single trust beneficiary objects.

5. Petitioners have accordingly failed to demonstrate any justification for this Court's review. They have not even alleged, much less shown, the existence of a conflict in the lower courts, that this question is of general importance, or even that the procedures employed in this case depart from the rules generally followed regarding approval of settlements. There is accordingly no basis for review under this Court's Rules.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 14, 1992

(3)

No. 91-873

Supreme Court, U.S.
FILED
FEB 21 1992
OFFICE OF THE CLERK

In The Supreme Court of the United States October Term, 1991

MARTIN RYAN, BERNARD MCKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH and KATHERINE DOYLE, Class Representatives of the December 31, 1987 participants in the City's Annuitant Healthcare Program, *Petitioners,*

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On Petition for Writ of Certiorari To the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONERS' IN SUPPORT OF THEIR PETITION FOR CERTIORARI

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Misstatement of the Question Presented 2

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ARGUMENT IN REPLY 4

A trustee's authority to compromise claims of the trust with respect to trust assets has never been interpreted to include the right to compromise the beneficiaries' personal claims against third parties. 4

CONCLUSION 7

No. 91-873

In The Supreme Court of the United States October Term, 1991

MARTIN RYAN, BERNARD MCKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH and KATHERINE DOYLE, Class Representatives of the December 31, 1987 participants in the City's Annuitant Healthcare Program, *Petitioners,*

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REPLY BRIEF FOR PETITIONERS' IN SUPPORT OF THEIR PETITION FOR CERTIORARI

Introductory Statement

The City's response first miscasts the nature of this as a dispute over gratuitous contributions to healthcare costs. Rather, the petitioners seek to enforce of a promised health care plan. The City then miscasts the issue as the trustees' power to compromise claims "involving trust assets". It is not. The issue is whether the Pension trustees opposing the participant class

adversely may compromise the City Healthcare Plan participants' direct personal claims against both the City (for a promised healthcare plan) and against the Pension Funds (for a promised subsidy) — claims with respect to which the Pension Funds trustees were adverse parties, not privy, to the participants, and were not entitled to prejudice the participants' claims.

Misstatement of the Question Presented

The City's brief misstates the questions presented. There is no such Illinois "rule of privity" that enables trustees to compromise beneficiaries' direct class claims against third parties.

As we have stated the questions before they are:

1) Whether, in three-party class litigation in state court, a court's dismissal of the class' claims with prejudice, based upon a settlement agreed to solely by the two parties opposing the class, deprives the class of its due process rights under the Fourteenth Amendment;

or, stated otherwise,

Whether this Court's holding in *Firefighters v. Cleveland*, 478 U.S. 501, 529-30 (1986) (that a settlement between some of the parties to a case cannot dispose of the claims a nonconsenting third party certified intervenor class), applies to invalidate a state court's dismissal with prejudice of the claims of an intervenor class upon the agreement solely of the parties opposing the class;

2) Whether in three-party state court class litigation, the enactment of state legislation purporting to extinguish the class' claims, pursuant to an agreement solely between the parties opposing the class, constitutes an invalid impairment of contract in violation of the Contract Clause, Art. 1, § 10 of the United States Constitution.

The City's Misstatements of Fact

The City, at 2, misstates this dispute as over the amount of money the City "contributes to the healthcare costs of retirees." Rather, the dispute has always been whether the City, having promised its employees and previously maintained a lifetime

fixed-rate retiree healthcare plan (the City of Chicago Annuitant Medical Benefits Plan, the "Plan") would be able to change or terminate that plan post-retirement, and whether the trustees could terminate their subsidy of the City's Plan.[1]

The City also misrepresents the intervenors' role, as if they first intervened at the end of the case to object to the settlement. In fact, they petitioned to intervene from the very beginning of the case, prior to most of the Funds; C.13 (November 23, 1987) and 251-259 (December 8, 1987), actively litigated through the formal grant intervention May 5, 1988 C. 793, and they were active party litigants thereafter in the following trilateral litigation involving the City, the Funds and the participants. Their June 10, 1988 motion for class certification (C. 961) was often deferred, but ultimately granted with the 1987 participants certified as a class. October 11, 1989, C. 1602, 1605, and the class certification was not limited to a certification for settlement purposes, but rather was a general certification. *Id.*

The City, at 4, also wrongly states that the participants supported the decision to hold the fairness hearing instead of rendering a decision on the merits. Originally on June 30,1989 and again on November 21, 1989 the intervenors asked the court to rule on the class' motion for summary judgment on the merits ahead of, or at the same time as, the fairness hearing (R.C. Vol. V, Item 12 and December 5, 1989 (C. 2170).

Thus, City's the basic misrepresentation of the facts is as if the litigation was two-way between the City and the Funds only, with the intervenors coming in only after the settlement was reached. Instead, the intervenors were present from the beginning, participated in the litigation actively, through the discovery and at the June 1988 trial, in pursuit of their claims *against the City* to force it to continue coverage under its promised plan. Indeed, the intervention was granted explicitly in recognition that the interests of the trustees and the participants might become divergent. Transcript of May 5, 1988 decision at 20, C. 793.

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[1] See Participants and Funds Interventions Counter-Complaints and Requests for Injunction R.C 13, 28, 67, 98, 183, 253, 283 and 341.

ARGUMENT IN REPLY

A TRUSTEE'S AUTHORITY TO COMPROMISE CLAIMS OF THE TRUST WITH RESPECT TO TRUST ASSETS HAS NEVER BEEN INTERPRETED TO INCLUDE THE RIGHT TO COMPROMISE THE BENEFICIARIES' PERSONAL CLAIMS AGAINST THIRD PARTIES.

Contrary to the City's response, City at 5, this case does not involve a trustee's compromise of claims involving *trust assets*.[2] Quite different, the claims at issue here were annuitants' direct claims: (i) against the City, that the City as their employer, had promised them a lifetime fixed-rate healthcare coverage plan during their employment; and (ii) against the Funds for a certain subsidy. The City does not in any way answer our argument that the trustees had absolutely no right to compromise the retirees' direct claims against the City-employer for contract, estoppel and vested rights, which were direct claims of the participants *against the City*, not derivative claims of the Funds. See our Petition at 10-13.

The issue was clearly preserved. The City is absolutely wrong in representing at 4 that "petitioners never objected to the Circuit Court decision to enter judgment." Rather, petitioners objected to the settlement and on June 30, 1988 moved for summary judgment on their claims, and repeatedly thereafter asked that their summary judgment motion be addressed prior to or at the same time as the other parties settlement. R.C.1602 October 11, 1989 and November 21, 1989 proceeding and ruling R. Vol. 5 Item No. 12, R.C. 3521. This was refused. The Petitioners never agreed that the court "need not decide the merits of the original

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[2] The three cases cited by the city deal solely with trustees' exercise of authority over a trust's assets. *In re Moir Hotel Co.*, 186 F.2d 377, 381-2 (7th Cir. 1951) (absent fraud, etc., trustees have discretion in voting trust shares differently from choice sought by minority holders of the trust); *Continental National Bank v. Sever*, 393 Ill. 81, 93, 65 N.E.2d 385, 391 (1946) (application of *cy pres* in expenditure of charitable trust's assets); and *Childs v. National Bank of Austin*, 658 F.2d 487 (7th Cir. 1981) (trust document interpreted to permit trustees to administer majority shares of bank in spite of conflict position of same person being trustee and bank chairman, where conflict was implicitly waived by testator.)

claims in the case". (City at 4) We asked that our motion on the merits be addressed first. And this was raised at each level of the process on appeal.

The City also misrepresents at 4, the basis for the Appellate Court's omission to address these claims. The Appellate Court gave absolutely no reason for evaluating the case solely on the issue of whether the settlement was substantively fair. It gave no reason for failing to address the due process claim made in the brief and repeated in request for rehearing, that the procedure to dismiss the participants' claims based solely on agreement of the other parties in the litigation was clear violation of our due process rights.

In sum, this case is just no different than if two defendants, having been sued, reach an agreement between themselves, then ask the court to determine that the agreement is fair and impose it on the plaintiffs, and the judge then enters the agreement and dismisses the plaintiffs' case with prejudice. There is simply no such "cram down" provision in class actions or general civil litigation, for that matter.

No participant - *not one* - testified in favor of the settlement. This is of some importance to note, since the City and the Funds went to some great effort to solicit retirees to testify in support of the settlement (see, e.g., Bernard Sweeney testimony at November 27, 1989 Fairness Hearing at 120. R. Vol. 5) But, the only participant testimony (500 written objections plus live testimony limited to ten persons by the court) unanimously opposed the settlement.

At 3, the City's use of *Firefighters v. City of Cleveland,* 478 US 501 (1986) for the notion that an intervenor may not block an agreement between two settling parties, omits mention that the consent decree there did "not purport to resolve" the non-consenting intervenors' claims. *Firefighters,* 478 US at 530. In contrast, the City and Funds here *did* purport to prejudice the class' direct claims against the City to continue the promised program and against the Funds to continue the subsidy. The participants here may not have been able to block an agreement between the City and the trustees concerning their rights *inter se.* But the City and the trustees here could not by an agreement

foreclose the retirees contractual healthcare claims against the settling parties.

The City's argument (at 6) that our position would prevent a trustee from settling claims of a trust over any beneficiary's objection is also just wrong. Trustees have the right to settle claims which are the trust's. They do not have authority to compromise claims which are the beneficiaries'. This critical distinction here is between derivative claims for the entity (which a trustee or corporate director may usually settle) versus direct claims of the beneficiary class (which are not the trustee or director's to settle) has been oft addressed in both shareholder and trust litigation. (See our Petition for Certiorari at 11).

CONCLUSION

The notion that two parties involved in three-party litigation may agree to have dismissed with prejudice the non-derivative third-party claims of the class opposing them is so abhorrent to fundamental due process notions that the petition for a writ of certiorari should be granted and the case summarily sent back for review in light of this court's holding in *Firefighters v. City of Cleveland.*

Respectfully submitted,

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